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REPORTS

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

CONTAINING DECISIONS AT

ATLANTA, MARCH TERM; MILLEDGEVILLE AND ATHENS, MAY
TERMS; SAVANNAH, AND PART OF THE DECISIONS
AT MACON, JUNE TERMS, 1857.

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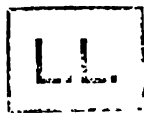
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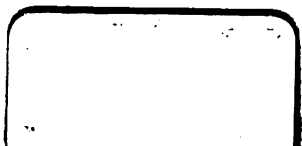
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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATLANTA,
MARCH TERM, 1857.

Present—JOSEPH H. LUMPKIN,
CHARLES J. McDONALD, } Judges.
HENRY L. BENNING,

**No. 1.—THOMAS HENDERSON, plaintiff in error, vs. NOLAN
TOUCHSTONE, defendant in error.**

•

When a party contracts, on the purchase of a negro in payment of a debt, to reconvey on the payment of the amount at which he was taken in a settlement, and agrees to reduce it to writing, but does not, and refuses to comply, it is not a parol contract within the statute of frauds, nor is it a case in which parol evidence cannot be admitted under the Act of 1837. *Cobb* 274.

In Equity, from Spalding Superior Court, November Term, 1856. Decision on demurrer, by Judge GREEN.

This was a bill in equity filed by Thomas Henderson, complainant, against Nolan Touchstone, defendant, for the recovery of a negro boy named Willis.

The bill alleges that in the early part of 1853, complainant, Henderson, borrowed of defendant, Touchstone, a sum of money, amounting to over eight hundred dollars, and gave his several small notes for the same, including a high rate of interest, and due the 25th December, 1853. That in March,

Henderson vs. Touchstone.

1854, said Touchstone demanded payment of said notes, and an agreement was then entered into between complainant and defendant, by which defendant was to take in payment of his demands, a certain negro boy named *Willis*, about fifteen years old, belonging to complainant, at \$800; a mule at — dollars, and the balance in cash; and defendant agreed, in consideration of said arrangement, that he would *oblige himself in writing*, to reconvey and deliver said boy Willis to complainant, at any time whenever he would pay to him the said sum of \$800, and that in the meantime, and until the payment of said sum by complainant, defendant should have the use and work of said boy, for the interest of said sum of \$800. That in pursuance of said agreement, complainant conveyed and delivered said boy and mule to defendant, and the balance of his demand he paid in cash. That defendant omitted and neglected to execute and deliver his obligation to reconvey said negro, upon the payment to him of said \$800.

That on the 16th of February, 1856, complainant made a tender of \$800 to defendant, and demanded a reconveyance and delivery of said negro, which defendant refused to do.

The bill prays for a specific execution of this contract—that the defendant be decreed to reconvey and deliver up said negro boy to complainant upon the payment of said \$800.

To this bill defendant demurred, for want of equity—that there was no consideration for the contract alleged in the bill, and that the same is obnoxious to the statute of frauds and perjuries.

After argument, the Court sustained the demurrer, and dismissed the bill, and complainant by his counsel excepted, and assigns error thereon.

ALFORD, for plaintiff in error.

DANIEL, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The demurrer admits the truth of the statements in the bill, and the defendant, so far, rests his rights on the complainant's own account of his case. Upon the bill alone, therefore, we put the decision of the case. The complainant owed the defendant a sum of money, and when he came to settle, he paid all but eight hundred dollars, and the defendant agreed with him, that if he would let him have the negro boy Willis at that sum, he would obligate himself in writing to reconvey him on the payment of the eight hundred dollars, the labor of the boy to pay the interest. This was all one transaction and negates the idea of an absolute sale of the boy.

There was a sufficient consideration to support the contract. It is to be presumed that if the sale had been absolute, the complainant would have exacted a larger price, or why stipulate for a written obligation to reconvey on the payment of the eight hundred dollars? If there was a contract of sale and a consideration to support it, there was equally a consideration for the contract to reconvey.

The complaint in the bill is, that if the contract for the reconveyance and delivery of Willis was not reduced to writing, it was defendant's fault, for it was his agreement that it should be; and his having refused to commit it to writing after getting possession of the negro, is a fraud upon the complainant. The Act of 1837, *Cobb 274*, prohibits the admission of parol evidence, to show that a deed or bill of sale, absolute on the face was intended as a mortgage, unless there is a charge of fraud in obtaining the same, in which case oral evidence to show fraud only, may be received. If the facts alleged in the bill, admitted to be true by the demurrer, amount to a fraud, the allegations are good as a charge of fraud, although the term "fraud," may not be used in the bill. They so characterize the transaction as to admit parol proof. But the contract was to be in wri-

 Caldwell & Co. vs. Dulin.

ting. It is not a case where the defeasance or condition was to rest in parol, but the party had been entrapped. The bargain was for a writing. He can now be compelled to execute that which he undertook to execute, and to perform it also.

The contract having been for a writing, we think that the statute of frauds had nothing to do with the case. But it does not appear that the contract was not to be executed within a year. It might have been executed within that time, and so the statute of fraud would not apply if it had been a parol contract. *Fenton vs. Emblers, 3d Burrows, 1281.*

We think the demurrer ought to have been over-ruled and the defendant ordered to answer.

Judgment reversed.

No 2.—R. & J. CALDWELL & Co., plaintiffs in error, vs. ADAM B. DULIN, defendant in error.

- [1.] D gave his notes with securities, in settlement of an account. Afterwards he filed a bill to open the settlement, alleging that if the balance was against him at all, it was not against him to an amount as large as the amount of the notes. *Held*, that he ought to have joined the securities as *complainants* with him, unless they were unwilling to be so joined.
- [2.] On a settlement between D. and C. & Co., the latter gave up to the former, certain securities of his, and received from him his notes signed by securities, for the balance, which C. & Co. claimed of him—he protesting that he was entitled to certain credits, which, as he alleged, had not been allowed to him, and declaring that he would set up those credits in defence to the notes. Afterwards suit was brought on the notes, and he filed a bill to enjoin the suit, and to open the settlement—in which bill he failed to make an offer to relieve the securities. *Held*, that such an offer was not necessary.
- [3.] The statements of a bill must have, at least, such a degree of certainty, that if admitted to be true, some decree may be rendered upon them; or some excuse must be given for the want of this degree of certainty—as, that the unstated particulars are exclusively within the knowledge of the defendant.

Caldwell & Co. vs. Dulin.

In equity, from Spaulding Superior Court. Decision by Judge Green, May Term, 1856.

The bill alleges that the complainant, Adam B. Dulin, prior to the year 1850, was an extensive cotton buyer in the town of Griffin, and had the reputation of being a good judge of cotton, as well as a safe and prudent purchaser—well knowing when to enter the market, how much to buy, and at what prices it was safe to invest—and had been for many years in the habit of purchasing, annually, large quantities, and shipping the same to commission merchants in the cities of Savannah, Charleston and New York; and that he had made consignments to the firm of Robert and John Caldwell, commission merchants, in said city of Charleston, who were thus well acquainted with the business habits and successful operations of complainant; that after the year 1850, Winthrop B. Williams became a partner in the house of Caldwells, which after that time did business under the name of R. & J. Caldwell & Co.

The said firm of R. & J. Caldwell & Co., the defendants, in order to secure the profits arising from the sale, storage and commissions on the cotton bought by complainant, entered into an agreement to furnish any amount of monied facilities to him to buy cotton in the said city of Griffin, which "his prudent purchases of cotton at Griffin would require during the years from 1850 to the end of this business," and that he was to consign to said defendants all the cotton which he should purchase, and after deducting their commissions of $2\frac{1}{2}$ per cent. for selling and discharging, and paying off the amount advanced by them, the balance of the proceeds of sales was to go to the credit of, and belong to complainant. Afterwards, defendants established a branch of their business in the city of New York, and discounted a draft for complainant against a shipment of cotton made to the New York house, and gave to him a letter of credit to draw upon said house to the amount of \$15,000, at from 60 to 90 days after

Caldwell & Co. vs. Dulin.

date or sight. With this facility complainant entered into the "cotton speculation contemplated by the contract," and agreed upon as aforesaid. Afterwards defendants gave to complainant authority to draw upon their house in New York for the further sum of \$3,000, at from 60 to 90 days, against cotton shipped.

Under this agreement complainant consigned to defendants all the cotton he bought, as long as defendants performed their part of the contract. He shipped to the house in New York four hundred and eighty-three bales, on which defendants realized profits to the amount of twenty thousand dollars, or other large sum; but defendants not only withheld advances, which, under said agreement, they were to make, but secretly and fraudulently furnished means to another party in Griffin to buy cotton, and misled complainant as to the propriety of continuing in the cotton speculation at the city of Griffin; and complainant, about the 8th of March, 1852, seeing that he could not buy in Griffin, more cotton, in a short time, than he was authorized by defendants to draw for, and most of the crop being sold and shipped, and having confidence in the market, and believing that a great advance in prices, would, in a short time, take place, proposed to defendants to furnish him facilities to make a special operation in the city of Savannah—the cotton to be shipped to their house in New York. This proposition defendants declined, unless a bonus was deposited, or an indemnity given; and to indemnify defendants against liability or loss on account of the funds and facilities to be furnished him to buy cotton in Savannah, complainant executed and delivered to them a bill of sale of twelve negroes, worth \$9,000, and which was absolute and to operate as a sale, only in the event of a loss to them on said speculation; and he gave his note to defendants payable five months after date, for the hire of the negroes* thus sold—they undertaking to have said cotton operation closed within that time. A time was appointed at which defendants were to meet complainant in Savannah to buy

Caldwell & Co. vs. Dulia.

the cotton, or furnish him with the money or facilities for buying the same, to the amount of one thousand or fifteen hundred bales; but defendants failed and refused to carry out said agreement, withheld the facilities to buy the cotton, and entered the market themselves, and made purchases secretly, by their agent; refused to accept the drafts drawn by complainant upon cotton shipped from Griffin, and concealed from him information in relation to the cotton market, and furnished information to others. That said 1500 bales of cotton could have been bought for the sum of fifty-one thousand dollars, and sold in the city of New York within the five months agreed upon, for the sum of seventy thousand dollars clear of all expence, and complainant thus realized nineteen thousand dollars; which he was prevented from doing by the fraud of defendants; and that prior to the year 1850, he gave to said R. & J. Caldwell a large number of blank signatures, to be used as occasion might require, and these were retained by defendants, J. & R. Caldwell & Co., to enable them to use complainant's name at pleasure in the proposed cotton operation in Savannah.

The bill further alleges that in the year 1851, complainant obtained from said defendants two thousand nine hundred dollars, to enable him to build and finish a steam saw-mill, in the county of Pike; and to secure this sum he procured his vendor of the land on which said mill was erected, (the same being 100 acres), to convey it to defendants; the said mills and land being worth \$5,000.

That in September, 1852, defendants brought suit for the recovery of said slaves, sold and conveyed as aforesaid; by virtue of the process issued in said case, (it being *bail trover*), the slaves were seized and lodged in jail; that in order to relieve said negroes from their confinement in prison, where their health and lives were jeopardized, complainant gave his three notes, with Archibald A. Gaulding and Augustus Merritt as securities, for the whole amount claimed by said

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defendants, to be due from him to them ; said notes amounting, in the aggregate, to the sum of \$5,827 44.

That at that time he did not know the full extent of the fraud which had been practiced upon him by defendants, or the state of the accounts as kept by them, and gave said notes, protesting that he did not owe said defendants, and that he had equitable setts-off which he would oppose to said notes ; and at the same time gave to defendants other lands in place of the saw-mill premises.

The bill further alleges that since the giving of the said notes the complainant had discovered that the defendants had practiced a further fraud on him, other than the non-compliance with the aforesaid contracts ; that in and for some years before the year 1850, complainant, at the request of R. & J. Caldwell, advanced money to William H. White and other persons, to ship cotton to said house, and by which consignments they realized commissions to the amount of five thousand dollars, or other large sum, and to a part of which commissions, by agreement, complainant was entitled ; but they failed and neglected to pay complainant any part thereof, and have concealed from him the amount he ought to receive, and he has thereby sustained damage to the amount of twenty-five hundred dollars.

The bill further alleges that in 1846, complainant having a large amount of cotton on hand in Griffin, which would have made him a profit of \$10,000, or other large sum, if he had not shipped the same until the railroad began to carry off cotton, and the railroad not being in use or running at the time, the house of the Caldwells proposed that if he would immediately send forward his cotton by wagons, and any loss was thereby sustained, that he should not be injured, but that they would furnish him with money at some favorable time to buy cotton, and hold the same for him until all losses should be made up by some one large purchase of cotton ; complainant, under this promise, sent forward his cotton by wagons, and thereby sustained a loss of five thousand

dollars, and said Caldwells, when there was an opportunity to make up this loss, wholly neglected to furnish the facilities as promised, but always pretended at such a time to be hard run to raise money to hold cotton, and thereby, would put off the complainant from time to time, by promising the money at some future time. That said Caldwells practised further frauds by making sales of cotton for him, under pretence that they were unable to hold, and that fraudulent sales of cotton were made by them, for their benefit, and to the great damage of complainant, and losses charged to him, which did not, in reality, occur or exist; and that the defendants have applied the proceeds of the cotton shipped to them, to pay off the unjust and fraudulent charges made by Robert and John Caldwell against him prior to 1850.

The bill further alleges that these frauds and fraudulent concealments, have come to the knowledge of complainant since he gave his notes in 1852, and which were then unknown to him; that said defendants have realized twenty thousand dollars, or other large sum in commissions from the consignments and business of the complainant; and that they have, by their failure to perform their agreements, and by their frauds and fraudulent concealments, inflicted upon him losses and damages to the amount of twenty thousand dollars, and for which they should account. That defendants have commenced suit against complainant and his securities upon two of the notes which have become due, and are still the owners and holders of the other note, not yet due. That defendants reside out of the State, and have no property in the same, sufficient to satisfy the demands of complainant.

The bill prays for a settlement and account; that the action at law upon said notes be enjoined; that defendants be restrained from disposing of the note not yet due, until the adjustment of their accounts; for discovery, general relief, &c.

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The bill was sanctioned and the injunction granted, at chambers, 21st October, 1855.

Defendants demurred to the bill for want of equity.

At the same time they filed their answer, admitting that complainant resided in Griffin at the time stated in the bill, and was a cotton buyer and shipper. That defendants, in their capacity as factors and commission merchants, received, at various times, consignments of cotton from him, but they deny that there was any such agreement as that set forth in the bill; nor did they agree, in any wise or manner, to furnish him facilities to pay for cotton he might purchase; nor did complainant bind himself to ship to them all the cotton he should purchase in Griffin; nor did they ever consider him so bound. That he did send to them of his own mere motion, and without their solicitation, a written paper, by which he agreed not to deal any more in cotton, unless recognized by them; that this paper, together with an *affidavit*, whereby he binds himself to abstain from the use of intoxicating liquors for a time therein specified, are the only obligatory instruments executed by complainant, now in their possession; and that from neither of these does the obligation alleged, appear, and they deny the truth of each and every allegation contained in the statements of said bill, and aver that the transactions between them were of the ordinary mercantile character. That complainant shipped to them such cottons as to him seemed advisable. That they, on the reception of the bills of lading, accepted the draft of complainant drawn on said shipment—on the arrival and delivery to them of the cotton, they exercised their best judgment as to the sale of it, and endeavored, in every instance, to the best of their ability, to faithfully perform the duties of skillful and prudent factors. That, when the cotton was sold, the proceeds were applied to the liquidation of the draft drawn on said cotton, and the residue paid over to complainant.

The answer further admits that, in 1852, defendants es-

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established a branch of their house in New York, and discounted a draft drawn by complainant against a shipment of cotton made to said house, and did give him the two letters of credit mentioned in the bill, but they deny that said letters of credit were given in pursuance of any agreement, as set forth in said bill, but that the transaction was the ordinary mercantile arrangement, by which consignors of limited means and restricted credit, are facilitated in negotiating drafts drawn on shipments of produce; that complainant did ship the cotton mentioned in his bill to the New York house, they admit, but they aver that said shipments were sold for him, and on his account, and account of sales and proceeds thereof, received by him, and the transaction, long since closed and settled, and that they received nothing therefrom, but their legal commissions of two and a half per cent. They deny that they ever entered into any agreement to make advances, and that they were at all times at perfect liberty, unrestricted by any contract, to do business when, where, and with whom they pleased; and deny all the charges of the bill as to giving false reports, or concealing information, and as to any and all false charges and fraudulent practices.

They deny that they ever agreed to furnish complainant with money or facilities to embark in a cotton speculation in Savannah, or entertained said proposal, or agreed, in any way, or upon any terms, to be connected with it; and they declare the entire statement respecting their demand for indemnity to be wholly untrue. That the bill of sale of the negroes mentioned in said bill, was executed to secure the payment of three promisory notes, given by complainant to defendant, for debts due by him, arising out of transactions prior to those set forth in his said bill; one note for the sum of \$4,183 62, due 1st January, 1852; one for \$4,476 46, due 1st January, 1853; and one for \$5,703 11, due 1st January, 1855; and they deny that said bill of sale was executed as

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an indemnity to them against any loss arising from the cotton speculation projected by complainant.

The answer admits that defendants did hold sundry blank notes signed by the complainant, that some were filled up and used for the benefit of complainant; that they were rendered available solely by their endorsements, and they were protected by them, being regularly taken up when due, and the money arising from the discounting thereof, was credited to complainant, and accounts rendered to him, and no objections were made thereto until the filing of this bill.

That apprehending that the negroes before alluded to would be removed by complainant, defendants instituted their suit and had said slaves lodged in jail, to be forthcoming on the recovery of judgment, and thereupon complainant entered into an arrangement by which the three notes above mentioned were cancelled, the negroes released and restored to complainant, and the title to the saw-mill premises given up, and in lieu of the securities so relinquished, defendants accepted of complainant his three notes with Gauling and Merritt as securities, amounting in the aggregate to \$5,827 44, and also accepted titles to other premises in lieu of those on which the mill was erected; and this settlement was affected by defendants giving up more than half their claim, and taking less than 50 cents in the dollar, as will appear by a comparison of the notes and titles relinquished and received.

They deny that there is any thing due complainant as his proportion of commissions on shipments made to them by William H. White, or that they ever authorized complainant to make any advances to White on their behalf; and they deny the statement of complainant in reference to his sending forward his cotton by wagon, in 1846, when transportation by railroad was interrupted, at their instance, or by their authority, and declare every matter and thing in said allegation to be utterly false; they deny all fraudulent sales of cotton, or that they ever realized from sales of the same, any thing more than their regular and legal commissions; they

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deny that they owe complainant any thing, and admit that they have instituted suit on said notes as stated in the bill, being forced thereto as the only means of recovering their debt from complainant.

Upon the coming in of the answer and hearing the demurrer, and after argument by counsel, upon the motion to dissolve the injunction and dismiss the bill, the Court overruled the demurrer and refused the motion to dissolve, whereupon counsel for defendants excepted to said judgment and decision on the following grounds.

1st. Because there was no equity in the bill.

2d. Because Merritt and Gaulding being interested in the decree sought by the bill, and enjoying the benefits of the injunction are necessary parties thereto.

3d. Because the bill seeks the rescission of a contract without, in any manner, reinstating the defendants in the condition they were before the execution of the contract.

4th. Because the allegations in the bill are too loose, uncertain and defective—admitting the same to be true—to justify any decree in favor of complainant.

5th. Because the defendants had filed their answer fully denying all the equities in the bill, if there were any.

STARK, for plaintiffs in error.

ALFORD & HAMMOND, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the Court right in overruling the demurrer?

The demurrer was founded upon an allegation that there was no equity in the bill.

And in support of this allegation, certain reasons are stated in the bill of exceptions. Of these the first is, that Dulin's sureties on the notes are not parties to the bill.

It was argued that, as the sureties were not parties to the bill, the decree would not bind them, and, therefore, that if the decree should be in favor of the defendants, they would, nevertheless, be exposed to the risk of another suit like the present, at the instance of the sureties.

This argument is sufficient to show that the sureties would be proper parties *complainant* to the bill; but it is not sufficient to show that they would be proper parties *defendant* to the bill. This must be manifest.

But they are not *necessary* as parties *complainant*; a decree can be rendered without them; and if it could not be, yet they cannot be made parties *complainant* against their will; no person can be made a suitor against his own will.

[1.] It follows that their absence as parties from the bill, could not be that which would show that there was no equity in the bill. Still the complainant ought to add them to the bill as co-complainants, unless they object to his doing so. The want, however, of even necessary parties to a bill, is not a cause for dismissing it, if such parties are to be had by a mere amendment.

The next reason stated in the bill of exceptions is, that the bill of complaint contains no offer to restore things to the state in which they were before the settlement was made.

But the settlement was made, the negroes delivered up, and the notes taken as security, in lieu of the negroes, in the face of a protest made by the complainant that he did not owe the defendants any thing, and that he would defend himself from the notes, by setting up cross demands against them; that is to say, would defend himself in the way in which he is now attempting to defend himself. It was in the face of this protest, that the defendants took the notes in lieu of the negroes; and doubtless, they did so, for sufficient reasons that were known to themselves. It is to be presumed, therefore, that if an offer had been made by the complainant to the defendants, to restore things to their old con-

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dition, the offer would have been rejected. And *lex neminem cogit ad vana, seu inutilia*.

Besides, it is questionable whether the maxim—one must do equity before he asks equity—would, even if this protest were not in the case, require more of the complainant, than an offer to let a decree go against him, should it turn out that the equity of the case would require a decree against him; as no decree can, in general, be rendered against a complainant, unless he has consented that one may be.

[2.] We think, then, that this reason was not a sufficient reason.

The next reason stated in the bill of exceptions, is, that the allegations in the bill are too uncertain. And this, surely, is a well founded reason as to most of those allegations.

The object the complainant wished to accomplish by the bill, was, as he states it, to open a settlement made by him with the defendants, and, in a new settlement, to get the allowance to him of certain demands of his against the defendants, which, he seems to mean to say, were not allowed to him in the old settlement. Of course, therefore, it was necessary that his bill should state those demands, with at least such a degree of certainty, that, if found true, they might serve as the basis of some decree.

The first of those demands, is that which, according to the bill, grew out of a contract, between him and the defendants, that was to be executed on his part at Griffin.

As to this contract, what the bill says, is, substantially, as follows: That the defendants were to supply the complainant with any amount of “monied facilities,” which his “prudent purchases” of cotton, at Griffin, might require, and were to do so for an indefinite length of time—viz: from 1850, till the “end of this business;” and he was to consign the cotton to them, and they were to sell it, take their advances and commissions out of the proceeds of the sales, and turn over the balance to him; that they failed to make advances to him, except to the extent of \$18,000, and, instead

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of doing so, made advances to "another party in Griffin," and did so in secrecy; that they misled him as to the propriety of continuing "in the cotton speculation;" that, about the 8th of March, 1852, he, perceiving that he could not buy in Griffin, more cotton, in a short time, than he was authorized by the defendants to draw for, most of the cotton crop there, having been sold and "shipped," and he, "having confidence in the market," proposed to the defendants, that he should be allowed to make a special operation in Savannah; and that they, on certain terms, accepted the proposition.

This is all that the bill says descriptive of the Griffin contract. The breach of that contract, complained of, is the failure of the defendants to make to him as large advances as the contract called for, and yet, there is no statement of what the damages were that resulted from that breach, nor any statement of any matters which might serve as a measure of what such damages were: as the prices of cotton in Griffin and in Charleston, respectively, at the times when, (if the advances had been made,) the cotton would or might have been bought by the complainant at the one place, and would, or might have been sold by the defendants, at the other place. Indeed, there is an admission which seems to neutralize the very allegation, that there was a *breach*, and therefore, of course, seems to show, that there could have been no damages—viz: the admission, that there was not in Griffin more cotton to be bought than what the complainant had authority to draw for, and that he, therefore, was induced to make a new proposition to the defendants.

Suppose all this were admitted to be true by the defendants, of what value would it be to the Court and jury, in making up a decree? None. It is impossible to tell from it, *how much* damages the complainant even claims.

No excuse is given for this defect in certainty; it is not said that the facts are in the knowledge of the defendants, exclusively, and that a discovery from the defendants would

enable the plaintiff to state the facts with the requisite fullness and particularity.

[3.] So far, then, as the Griffin contract is concerned, it is true, we think, that the statements of the bill are too uncertain.

This contract labors under another objection, one, however, which was not urged before this Court, or the Court below, and, therefore, one, the sufficiency of which, this Court does not decide. That objection is, that the damages, if any, which resulted from the breach of the contract, if there was a breach of the contract, must have consisted merely in a loss of *profits*—viz: in the loss of the profits which the plaintiff *would* have made if the defendants had complied with their part of the contract, that is, had furnished the plaintiff with means with which to “speculate” in cotton, for an indefinite length of time.

The next mentioned demand is one which the bill says grew out of a contract to be performed at Savannah—a contract that was to take the place of the contract just considered.

What has been said of the contract just considered, in respect to its want of certainty, may, for the most part, *mutatis mutandis*, be said of the contract now under consideration. The bill neither states the prices of cotton prevailing in Savannah, during the plaintiff’s buying time, nor the prices of cotton prevailing in New York, during the defendants’ selling time.

The plaintiff was to be at liberty to purchase from 1000 to 1500 bales of cotton. *How many* he *would* have purchased if he had been supplied with money by the defendants, is not stated, if, indeed, such a thing could have been stated.

No excuse is rendered for the failure to state these facts.

The damages consist merely in the loss of supposed profits. The allegations, then, in respect to this contract, are also too uncertain.

Another of the demands is one which, according to the

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bill, grew out of the fact, that the plaintiff, at the instance of the defendants, sent to them a quantity of cotton by wagons, instead of keeping the cotton until the railroad resumed operations, and sending it by the railroad.

What is true of the two contracts above mentioned, is *mutatis mutandis*, for the most part, in a greater degree, if possible, true of this.

Further, the bill sets up demands in favor of the plaintiff against the defendants, on the score of frauds practiced on him by them, in selling his cotton under the pretence that they were unable to hold it longer; on the score of losses charged to him, which did not, in reality, exist; on the score of a fraudulent misapplication of the proceeds of the sales of his cotton.

The allegations in respect to all of these demands, are too uncertain. It would be a waste of time to specify the particulars, in which the want of certainty consists.

There remains for notice, but one other demand, and that, we think, not however, without much difficulty, is set forth with a sufficient degree of certainty. That demand is the one founded, according to the bill, on advances made to White and others, at the request of the defendants. In respect to this demand, the bill says that the plaintiff, at the request of the defendants, advanced money to White and others, to be laid out in cotton, which was to be shipped to the defendants and to be sold by them; that the commissions on the sales were to be divided between the plaintiff and the defendants; and that the commissions on the sales amounted to \$5,000. There is, perhaps, enough of certainty in this statement to found some decree upon.

To this demand, however, two other objections were made: first, that it was barred by the statute of limitations; secondly, that it was a demand existing, not against the defendants by themselves, but against them and one Williams, jointly.

As to the first of these objections—the demand is one founded on an account which was between merchant and

merchant, and which concerned the trade of merchandise. Such an account is expressly excepted from the operation of the statute of limitations.

As to the second—the *bill*, it is true, says, that Williams was not a member of the firm when this demand arose; but the *answer*, in its title, shows that he was. And the mistake in the bill may be corrected at any time. There can be little harm, therefore, in assuming that the correction will be made. At all events, we think that this objection is not such a one as to require the bill to be dismissed at present.

So much for the grounds of the demurrer, resting in the want of certainty in the allegations of the bill.

The reasons given by the bill, as the reasons why the demands set up in the bill were not brought into the settlement that was made, are far from satisfactory. There is, however, I think, saving efficacy in one of those reasons: the defendant says that he entered into the settlement, protesting that he did not owe anything, and that he had “equitable set-off,” which he should oppose to the notes that he was giving. This, as I conceive, made the settlement amount to no settlement at all.

There is but one exception left. The defendants insisted that their answer had sworn off all the equity of the bill. The Court below held that it had not, and refused to dissolve the injunction.

This decision will not be disturbed. The answer is not full as to the allegations respecting the demand founded on the advance to White and others, nor as to those respecting the settlement. Besides, it seems itself suspiciously fond of dwelling in generalities.

The result is, that all the judgments of the Court below, must remain undisturbed.

Judgment affirmed.

 Booty vs. Brazier. adm'r's.

No. 3.—JOHN L. BOOTY, plaintiff in error, vs. AMANDA BRAZIER, adm'r's, defendant in error.

A. agrees with B., that in consideration of the labor and service of certain slaves held and owned by B., he will maintain, or cause B. to be suitably supported, for and during the term of her natural life, and A. executes and delivers to B. his obligation to that effect. *Held*, that the transfer of A's interest in the slaves to C., is a sufficient consideration for the note given by C. to A. for the purchase of said interest.

Assumpsit, from Monroe Superior Court. Tried before Judge POWERS, at March Term, 1856.

This was an action brought by John L. Booty against Amanda W. Brazier, administratrix of Elijah W. Brazier, junior, deceased, for the recovery of the amount due on a promissory note, of which the following is a copy, to-wit:

“§1070. By the 25th day of December, eighteen hundred and fifty-three, I promise to pay John L. Booty, or bearer, one thousand and seventy dollars for value received. December the 21st, 1852.

(Signed,) E. W. BRAZIER. Junior.

The defendant pleaded the general issue. And further, that the consideration of said note was a number of negroes so'd by Booty to Brazier, and to which Booty, at the time of the sale, had no right or title, but the same belonged to one Lydia Locke, and that said promissory note is wholly without consideration and void.

The facts of the case are substantially as follows:

Lydia and Elizabeth Locke, two old maiden ladies, aunts of Booty, resid edin the county of Warren prior to 1848, and owned there a settlement of land, negroes and stock. Plaintiff Booty went to Warren, and induced his aunts to remove to the county of Monroe, and live with him; he sold their lands for about \$3300, and one negro. In 1843, the Misses Locke, with their negroes, removed to Booty's house in

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Monroe county, he promising to treat them well, and to take care of their negroes. They remained there until 1851, when some difficulty and unpleasant feelings arising about Booty's treatment and management of the negroes, the Misses Locke left his house and took with them their negroes, and went to live with E. W. Brazier, junior, who resided in the neighborhood.

In 1849, an instrument in writing, of the following form and purport, had been executed by Booty, and delivered to Miss Lydia Locke, (to whom it seems the negroes alone belonged,) said instrument drawn agreeably to the directions of Booty and said Lydia, read over to her, and by her handed over to Edmund Dumas, the draughtsman, for safe keeping, to-wit:

GEORGIA, } Know all men by these presents, I,
 Monroe County, } John L. Booty, am held and firmly
 bound unto Lydia Locke and Elizabeth, in the just and full
 sum of one thousand dollars, for the true payment of which I
 bind myself, my heirs, executors and administrators, jointly
 and severally, firmly, by these presents, sealed with my seal,
 and dated this — January, 1849.

The condition of the above obligation is such, that whereas the said Lydia Locke has this day, put under the control and management of the above named John L. Booty, the following named negroes, viz: Edney, Reddick, Jane, Hester, Ann and Fanny, which negroes are to be clothed, fed and managed as the said John L. Booty's negroes, and that the said John L. Booty is to control and manage them, and to have the proceeds of their labor for and during the natural life of the said Lydia and Elizabeth Locke.

Now, if the said John L. Booty does feed and clothe the said Lydia and Elizabeth Locke in a decent-like manner suitable to their conditions in life, for and during their natural lives, or cause it to be done, then the above obligation to

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be null and void, otherwise to remain in full force and virtue.

(Signed) JOHN L. BOOTY, [L. s.]

Test, EDMUND DUMAS.

After the difficulty and removal of the Misses Locke and their negroes to Brazier's, he made an agreement with Booty and agreed to take up the above bond, and give his own in lieu thereof, and in consideration of Booty's relinquishment of his rights, and interest in said negroes, under and by virtue of said instrument, the note upon which this action is brought was given.

There was some conflicting testimony, and the presiding Judge charged the jury, that to support a contract, there must be a legal consideration—therefore to entitle plaintiff to recover on this note, there must be such a consideration to support it as the law regards as valuable. The alleged consideration of this note is the surrender by Booty of his claim to the negroes of Miss Locke. He had no such claim to them by the bond, the abandonment of which would or could constitute a consideration for the note. If the note was given for this claim, it is without legal consideration. His bond was only obligatory on him while Miss Locke chose to continue her negroes with him; when she withdrew them he could not be compelled to support her or pay the bond. She had executed no deed or conveyance of her negroes, or interest in them to him, by accepting the bond, but failing to sign it herself—it being intended to be signed by all parties.

The jury found for the plaintiff the amount of the note, notwithstanding the charge of the Court. Defendant moved to set aside the verdict, and for a new trial, which was granted, and plaintiff excepted and assigns error.

PINCKARD & GIBSON, for plaintiff in error.

TRIPPE, for defendant in error.

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By the Court.—LUMPKIN, J. delivering the opinion. •

Conceding that the note sued on, was given for the negroes, of which we apprehend there can be no doubt, the only question in the case is, was it founded upon a valid consideration? If it was, the verdict of the jury was right, and the court was wrong in granting a new trial.

It seems that Lydia and Elizabeth Locke, two maiden aunts of John L. Booty, were residing in the house with him; that there were on the plantation, five negroes belonging to one or both of these females; that in January 1849, Booty and his aunts entered into an agreement to the effect that he was to maintain them during their lives, or cause it to be done, and that he was to have the use of the negroes, for and during that time. Booty executed his bond in fulfillment of his own part, and it was delivered by Lydia Locke to Edmund Dumas, the friend of the obligee, to keep for her. Booty took possession of the slaves; treated them as his own for some time, when the old ladies became dissatisfied; left abruptly, carrying off the negroes with them. Some negotiations ensued for the return of the parties, which failed of success. They took up their abode at Elijah W. Brazier's, the intestate of the defendant. Booty, instead of repossessing himself of the negroes as he was unquestionably entitled to do, acceded to a proposition from Brazier to transfer to him his interest in the slaves, for fifteen hundred dollars, which was three hundred less than Brazier was willing to have given, and at the same time a satisfactory arrangement was made, to substitute Brazier's bond for Booty's, for the maintenance of the two aunts, and here the matter ended.

Can there be a doubt, that the note thus given by Brazier to Booty for the life interest which Booty held in the negroes, was founded upon a valuable consideration? We think not, and consequently, reverse the judgment of the Court below, ordering a new trial.

Judgment reversed.

Carhart, Brothers & Co. vs. Wynn.

**No. 4.—CARHART, BROTHERS & Co., plaintiffs in error, vs.
WILLIS WYNN, defendant in error.**

- (1.) To make an objection to evidence available as error, it must be made during the trial. It cannot be good after verdict, on a motion for a new trial.
- (2.) It may be shown by parol evidence, that the endorsement of a note was made for a special purpose—for instance, as an authority to collect.
- (3.) Notice by an endorser, to sue, given to an agent who has no authority but to receive the amount due, and that is made known to the endorser, is not such a notice to the "holder," under the statute, as will discharge the endorser.

Complainant, from Mouroe Superior Court. Tried before Judge GREEN, at August Term, 1856.

This was an action brought by Carhart, Brothers & Co., against Robert W. Moore, the maker, and Willis Wynn the endorser, of a promissory note, for the recovery of a balance due on said note.

Defence by Wynn the endorser, that he had given plaintiffs notice, after the note became due, to sue, and they having failed to do so for more than three months, as provided by statute, he was discharged from his liability as endorser.

Wynn upon the trial, proved by *Jonathan Johnson*, the only witness sworn in the case, that in the latter part of 1851, plaintiffs sent him the note for collection only, and for no other purpose; and that while the same was in his possession, Wynn notified him to sue on said note, and that he informed Wynn that the note was in his hands only to receive the money on it, and not to sue; and that afterwards in 1852, he returned the note to plaintiffs, and informed them that Wynn had given him notice to proceed to collect said note. Witness could not say the length of time he held the note, nor whether he delivered the note to plaintiffs or to Col. Trippe, their counsel, but to the best of his belief, he returned it to plaintiffs, and within a year after the last credit on it, but it might have been two years; he did not return it in three

months after the notice—that he had no interest in said note, and so informed Wynn, when he notified him to sue and collect.

The jury returned a verdict for plaintiffs for \$67 70, and interest from December, 1st, 1851, with cost of suit: and counsel for Wynn moved the Court for a new trial, on the following grounds:

1st. Because the Court erred in instructing the jury, that if they believed Jonathan Johnson informed defendant that his agency was limited to receiving the money on said note, he was not a *holder* in the sense of the law, to be notified to sue; and that if they so believed, then if Johnson gave information of the notice to plaintiffs, that was not a notice to entitle defendant Wynn to its benefit, unless they further believed he was agent for that purpose.

2d. Because the evidence of said Johnson, contradicting the endorsement on the note to himself, was illegal.

3d. Because the verdict is contrary to law and evidence.

Counsel for plaintiffs objected to the second ground for new trial, because the endorsement to Johnson was stricken out before the trial, and it did not appear when said endorsement was made, nor was it read in evidence to the jury, nor was any question in relation to it raised on the trial, either to the Court or jury; and if said endorsement was upon the note and erased before the trial, it was too late, after verdict, to raise the points made in the second and third grounds for new trial.

The Court overruled the objection and refused a new trial on the first ground, but granted it on the second and third grounds; holding, that although said endorsement, which was erased, was not read in evidence to the jury, nor their attention nor that of the Court called to it by either party, on the trial, yet defendant had the right, after verdict, to found his motion for a new trial, on the fact that there was such endorsement and erasure, and the Court would presume that they were on the note at the time of the trial, and that al-

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though not read, they were in evidence, and that the Court should have predicated its charge upon the legal effect of said endorsement, it being the duty of the Court to know what evidence was before the jury, whether counsel noticed it or not; and the Court being of opinion further, that said endorsement constituted Johnson the "holder" within the meaning of the statute.

To which decision counsel for plaintiffs except, and assign the same as error.

TRIPPE, for plaintiffs in error.

HARMAN, represented by GIBSON, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The Court having overruled the first ground in the motion for a new trial, we will not refer to that.

[1.] No objection was made during the trial to Johnson's evidence. An erased endorsement is no endorsement, and can, therefore, of itself be no evidence. If it had been *bona fide* made to pass the title, and fraudulently erased to defraud the defendant, it ought to have been proven, for mercantile usage does not raise a presumption of that sort. The note must have been offered in evidence on the trial, and the failure to except to Johnson's evidence was a waiver of all objection to it, if, indeed, there was an available objection to it. A party cannot pass over an objection, obvious upon the face of a paper, in evidence, take the chances of a verdict in his favor, and after a verdict against him, avail himself of it on a motion for a new trial. *Bank of Utica vs. Smith*, 18. *Johns. Rep.* 239.

[2.] But if Johnson's testimony had been objected to as inadmissible, the objection ought to have been overruled. Notes are often endorsed as a bare authority to the endorser to receive the money due thereon. Parol-evidence is admissible to prove whether he was in possession of the note as owner

or agent, and if the latter, to show the extent of his authority, when innocent parties will not be affected thereby.

[3.] Johnson informed the defendant at the time he notified him to sue, that his authority did not extend beyond receiving the money on the note, that he was not authorized to sue, and that he had no interest in the note. If Johnson had not explained to the defendant, at the time of the notice, the nature and object of his possession of the note, the notice would have been available as a defence for Wynn, the defendant. In that case, the absolute endorsement of the note would have controlled; for in the absence of explanatory proof, the legal presumption of absolute ownership in Johnson would have given full effect to the notice as a discharge.

Our brother BENNING concurs with us in a judgment of reversal, but upon a somewhat different view of the case. He is of opinion that the legal presumption is that the endorsement of the paper and its erasure were simultaneous acts, or rather, that the one followed the other immediately; that the endorsers after writing the endorsement changed their mind and struck it out. If so, there never was, in reality, any endorsement, and if there was no endorsement, then there was nothing before the jury that could have been considered by them as an endorsement.

If there had been a subsisting endorsement to the agent, he should doubt extremely, whether, as he would be the holder of the paper with a perfect legal title, he would not be a proper person to be notified under the statute; whether, in such a case, he would not have had the *legal* right to sue on the note, whatever he himself might think or say to the contrary; or whether he would not, at least, be such an agent, that the notice to him would not be notice to his principal; whether it is not the duty of an agent to collect, to transmit such a notice, when he receives it, to his principal, and whether, in such case, notice to him would not be notice to his principal.

Judgment reversed.

Pinckard vs. McCoy.

No. 5.—JAMES S. PINCKARD, propounder, plaintiff in error,
vs. HUGH MCCOY and ALEXANDER MCCOY, caveators, de-
fendants in error.

A testator said by his will, in effect, that after the payment of his debts, his desire was, that his negroes should be hired out until their hire, together with any surplus of the fund ordered to be applied to the payment of debts, should amount to \$1800. That when this sum was thus raised, and was in the hands of his executor, he willed to his executor certain negro slaves, in trust to be conveyed by him to some one of the free States and there left; but if the executor was prevented from executing this provision, then he bequeathed the negroes to the executor in trust, to be delivered by him to the Colonization Society. And he said further, he gave to the executor \$200 for his trouble in carrying out the above provisions; and that the surplus, if any of the \$1800, was to be divided among the negroes, after their removal.

Held, that all of these provisions were void.

Caveat, from Monroe Superior Court. Tried before Judge POWERS, March Term, 1857.

This case came up on appeal from the decision of the Court of Ordinary of Monroe county, admitting to probate and record the following instrument of writing, as the last will and testament of Thomas McCoy, deceased, viz:

GEORGIA, } In the name of God, amen. I Thom-
Monroe County. } as McCoy of the county and State afore-
said, being of sound and disposing mind and memory, do
make, publish, and declare the following, to be my last will
and testament, hereby revoking all others at any time hereto-
fore made by me; believing in the resurrection of the dead,
and hoping salvation through faith in the Lord Jesus Christ.

Item 1st. I wish a decent, christian burial.

Item 2d. I will and direct, that all my perishable and personable property, (except my negroes or slaves) be sold, and all debts which may be due me collected as soon as practicable, and the money so collected, and that arising from the sale of the property above named, as well as any money that I may have at my death, appropriated to the payment of my debts, if it shall take so much to pay them. But if the

money arising from the sale of the property above directed to be sold, and that on hand at my death, and that collected from debts due me, shall not be sufficient to pay my debts, I will and desire that all my negroes be hired out, and the proceeds thereof applied to the payment of my debts, until they are all discharged, and after the payment of my debts in the way above directed, my will and desire is, that all my negroes be hired out until the proceeds arising therefrom, together with any portion or surplus that may remain after the payment of my debts, accruing in any way from my estate, shall amount to the sum of eighteen hundred dollars.

Item 3d. When the aforesaid sum of eighteen hundred dollars shall be raised and in the hands of my executor, after the payment of my debts, I will and bequeath to my executor the following negro slaves, and their increase, to-wit: Miles and his wife Mariah, Guilford and his wife Caroline and her two children, to-wit, Charles and Henrietta; Frank and his wife Mariah, Jude, Eliza, Louisa, Fanny and Hannah, and the increase of each of them, in trust, to be conveyed or caused to be conveyed by him to some one of the free or non-slave-holding States, and there left by him. But in the event that my said executor shall be prevented from any cause whatever from carrying out the wish and intention of this item above expressed, then I will and bequeath the whole of the above named negroes and their increase, in trust to my executor, to be delivered by him to the Colonization Society.

Item 4th. I will and bequeath the sum of two hundred dollars to my executor to compensate him for his trouble for carrying out and into effect the third item of this my last will and testament. And I further will and direct that any surplus of the eighteen hundred dollars that may remain after carrying said negroes and their increase to a free State or the Colonization Society, be equally divided and paid to said negroes, share and share alike.

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Item 5th. I hereby nominate and appoint James S. Pinckard executor of this my last will and testament.

his

THOMAS X MCCOY, [SEAL.]

mark.

Signed, sealed, published and delivered in presence of us witnesses, who sign at the request of the testator, and in his presence, and in the presence of each other, this May 2d, 1854.

ABSALOM JONES,
BENJAMIN WATKINS,
ZADOCK WILSON.

The propounders proved, in the usual manner by the subscribing witnesses, the execution of the paper propounded, as the last will and testament of Thomas McCoy, deceased, and then offered the same in evidence.

Caveators objected to the admission of said paper as the last will and testament of said McCoy, on the ground that it contravened and was in violation of the statutes of this State against manumission, and was illegal and void. The presiding Judge sustained the objection, and rejected the paper as the last will and testament of deceased.

Counsel for propounders excepted, and tender their bill of exception, and assign error.

TRIPPE & PINCKARD, for plaintiff in error.

SMITH & GIBSON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

This Court is of the opinion, that this case does not differ in principle, from the case on Beall's will, decided by this Court at Savannah, in January 1857. In that case, this Court decided that all of the emancipation parts of the will

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were void. It has heard nothing in the argument of the present case, to make it think that, that decision was wrong. This Court, therefore, thinks that all of the emancipation parts of this will are void. Those parts are all of the third and fourth items, and that portion of the second which begins with the words, "And after the payment of my debts in the way above directed, &c." The other parts of the will are, in the opinion of the Court valid

The result is, that the Court thinks that the Court below was partly right and partly wrong; right in rejecting the emancipation parts of the will; wrong in rejecting the other parts.

So far as I am individually concerned, I beg to refer to what I have said in *Adams vs. Bass*, 18 *Ga. Rep.*, 147, and in *Cleland vs. Waters*, 19 *Ga. Rep.*, 35, for the reasons which govern me in this decision.

Judgment Modified.

No. 6.—SUSAN A. PINCKARD, plaintiff in error, vs. JOHN PINCKARD, defendant in error.

It is no sufficient reply to an application for temporary alimony by the wife, pending a libel for divorce, that the husband has made provision for her maintenance, and will do so in future.

Libel for Divorce, from Monroe Superior Court. Decision by Judge GREEN, at September Term, 1856.

The plaintiff in error, filed her libel in the Superior Court of Monroe county, for a partial divorce from her husband, John Pinckard, the defendant in error.

Pending the action, plaintiff's counsel made a motion for an order to grant libellant temporary alimony *pendente lite*, and for counsel fees.

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The pendency of the suit and marriage of the parties were admitted by the respondent, but he offered testimony to prove that he had provided libellant with board, clothing, and support; to the introduction of which libellant's counsel objected. The Court overruled the objection, and libellant excepted.

James H. Dumas, after being examined in chief by respondent's counsel, as to board paid to him by respondent for his wife, was turned over to libellant's counsel, who proposed to ask witness if respondent had not defamed the character of his wife, to which question counsel for respondent objected; the Court sustained the objection and libellant excepted.

The testimony being closed, his Honor the presiding Judge refused the motion for alimony, but allowed libellant one hundred dollars for counsel fees. To which decision counsel for libellant excepted.

TRIPPE, for plaintiff in error.

GIBSON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This was a libel for divorce, brought by the wife against the husband. Application was made by the wife for temporary alimony and lawyer's fees. The Court allowed the last, but refused the first, upon the ground, that the husband had made provision for the support of the wife.

We do not consider this a good reply, in bar of the application.

Where the wife has a separate estate, sufficient to maintain herself, alimony will not be allowed. In all other cases, the uniform practice has been for the Court to direct a suitable sum to be paid quarterly, semi-annually or yearly; and the fund to be placed in the hands of the wife, uncontrolled by the husband; and in the opinion of this Court, it would

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be unwise to depart from this well settled practice. Alienated in feeling as the parties always are, it would lead to endless altercation and confusion to adopt the course here proposed. And the record before us illustrates most strikingly, the truth of this opinion. There is a suit now pending, at the instance of Mr. Sanford, against the husband, for a bill of goods furnished the wife, which the merchant considered necessary, but which the husband refuses to pay. Look at the letter written by the husband to Mrs. Mary A. Bean, the lady with whom the wife was boarding! "I now hope for the future, never to have any communication with any person she (his wife) can enlist in her infamous course, or give her shelter or protection." Should the maintenance of the wife be entrusted to the judgment of a husband thus exasperated against her, with or without cause?

To avoid all this bitterness and bickering, not only adding to the wretchedness of the parties themselves, but embroiling the whole community, and enlisting them in the unhappy controversy, is it not best for both parties, even the husband himself, that the Court should fix the amount, and let it be paid over directly to the wife, to be disposed of as she may see fit; and thus put an end to this superadded source of vexation and strife? If the wife waste or misapply the allowance thus appropriated, it will be her misfortune.

In this case, in adjusting the alimony, the Court should look to what has been heretofore advanced by the husband, which should be allowed—as a credit against any *past* alimony which may be decreed.

Judgment reversed.

Byars vs. Bancroft et al.

No. 7.—RICHARD G. BYARS, plaintiff in error, vs. BANCROFT, BETTS & MARSHALL, defendants in error.

- [1.] A notice given at a Sheriff sale, that a mortgage, held by a third person who is not present, and when the proceedings are without his consent, will be paid from the proceeds of sale, or by the persons giving the notice, will not bind the mortgagee; but the mortgagor giving his consent will be bound.
- [2.] Persons holding junior judgments will not be bound by such notice.
- [3.] Mortgagees may waive the lien of their mortgages and claim the money, with consent of mortgagor, without foreclosure.
- [4.] Mortgagees cannot claim, against the rights of other judgment creditors, even with the consent of the defendant, money arising from the sale of property not mortgaged.
- [5.] Plaintiff in execution may withdraw an execution from the Sheriff or the Court, but if he withdraw it when it is entitled to the fund, purchasers, *bona fide*, of property from the defendant, and securities, may have an equity against its enforcement against them.

Rule against Sheriff, from Butts Superior Court. Decision by Judge GREEN, December Term, 1856.

Richard G. Byars, the Sheriff of Butts county, sold a certain tract of land, and other property, belonging to Nathan F. Camp, on the first Tuesday in November, 1856. The land was levied on under an execution issued on a judgment, dated 11th September, 1855, in favor of Alpheus W. Benham & Co., vs. said Camp. The land was under mortgages; one to Robert G. Duke, dated 16th February, 1855, and one to Bancroft, Betts & Marshall, dated 7th February, 1856, neither of which was foreclosed at the time of the sale, and Bancroft, Betts & Marshall's not due. Bancroft, Betts & Co., by their agent, Wiley T. Burge, gave public notice on the day of sale, that the land was sold free from the lien of their mortgage, and also read the following paper, to-wit:

"In the sale of the land of Nathan F. Camp, it is consented and agreed, that the mortgage lien of Robert G. Duke, is first to be paid from the sale, and if it is not paid from the sale, then we will see it paid, or his lien to continue.

(Signed,)

W. T. BURGE, Agent,
For Bancroft, Betts & Marshall."

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Burge the agent, and Camp, stipulated in writing, as to the manner of disposing of the fund arising from the sale of the land, which was made known at the sale.

The following is their agreement, viz:

"In the sale of the land of Nathan F. Camp, it is consented and agreed by all parties interested, that Robert G. Duke's mortgage be first paid out of the funds of said land; that Bancroft, Betts & Marshall be next paid their mortgage of two thousand dollars principal, out of the funds of said land, and that the remainder of the purchase money of said land, be appropriated to the executions of Bancroft, Betts & Marshall sued out for the use of L. Wiley & Co., by Andrews & Little, and transferred to said firm.

(Signed,)

N. F. CAMP,

W. T. BURGE

For Bancroft, Betts & Marshall."

At the sale, Duke did not waive his mortgage or its lien. There were other *fi. fas.* older than either of the mortgages, one of which was owned and controlled by Bancroft, Betts & Marshall.

The land was sold to Henry B. Fletcher, who bid it off for the sum of five thousand dollars.

It appeared in the Sheriff's return, that he had in his hands divers other *fi. fas.* against the said Camp, issued from the Superior and Inferior Courts of Butts county, and that he had in hand \$913 raised from property other than the mortgaged land.

It appeared further, that there was an execution in favor of Charles F. Newton and Isaac W. Nolan, administrators &c., vs. Nathan F. Camp and James B. Camp—older than any other *fi. fas.*—assigned to Bancroft, Betts & Marshall, in the hands of the Sheriff, brought into Court by a subpoena, *duces tecum*, at the instance of the defendants, which the Court allowed to be withheld from claiming any funds, the assignees objecting to its being paid.

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Nathan F. Camp gave the sheriff notice to pay the above *fi. fa.*, it being the oldest against him, from moneys in his hands arising from the sale of his property.

Under this state of facts, Bancroft, Betts & Marshall, obtained a rule against the Sheriff to show cause why he should not pay over the said fund, &c.

The Sheriff also received a notice from Camp, to apply the money arising from the sale of the land, to the satisfaction of the *fi. fa.* held by Bancroft, Betts & Co., and which was older than the mortgage which they held.

After argument, the Court ordered, the funds in the Sheriff's hand arising from the sale of the land, to be applied first to the payment of Duke's mortgage; secondly, to Bancroft, Betts & Marshall's, next to the payment of the *fi. fa.* of Benham & Co., and the residue to be applied rateably to the general *fi. fas.* agreeably to their priorities.

To which order counsel for the Sheriff excepted, and assigns the same as error.

D. J. BAILEY, for plaintiff in error.

J. H. STARKE, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

The judgment of the Court, in this case, was predicated on the agreement of certain of the parties having mortgages and executions against the defendant Nathan F. Camp, which are set forth in the foregoing statement of facts. The Sheriff brings this case before the Court, not because, by the judgment of the Court, he has been subjected personally to wrong or injustice, but to protect him against any movement that may hereafter be made against him, which might result in his injury. Without pausing to enquire and determine whether this precautionary step is necessary to his future safety, we will give the case a direction, which, while it may

promote the adjustment of the rights of parties, will certainly protect him from eventual injustice.

The oldest lien on the property of the defendant that appears in the record, is the execution of Charles F. Newton and Isaac W. Nolan, administrators, &c. vs. Nathan F. Camp, and Jas. B. Camp. The judgment on which it was issued, bears date in September, 1854.

Duke's mortgage next in order of time, is dated 16th February, 1855.

The judgments on which the following executions against Nathan F. Camp were issued, all bear date in September, 1855. John Andrews and Joseph C. Little, for the use of L. M. Wiley & Co., assigned to Bancroft, Betts & Marshall; Alpheus W. Benham and Kinchen P. Tyson; and Warren W. Woodruff.

The foregoing mortgages and executions, and the execution in favor of Andrews & Little for the use of L. M. Wiley & Co., exclusive of the execution in favor of Newton & Nolan, are more than sufficient to absorb all the money in the hands of the Sheriff, arising from the sale of Nathan F. Camp's property, leaving a multitude of executions unsatisfied.

[1.] The land mortgaged to Duke, was sold subject to his mortgage. He gave no consent to the sale, and does not interpose his mortgage to claim the money. That whole matter was managed without his privity, by Bancroft, Betts & Marshall, with the consent of N. F. Camp, the mortgagor and defendant in the several executions. Camp gave his consent that the mortgage of Duke should be paid out of the proceeds of the sale of the land. Bancroft, Betts & Marshall, gave notice at the sale, by their agent, of that consent, and also that if it was not paid from the sale, they would pay it. This consent and notice, cannot deprive Duke of the right to foreclose his mortgage and proceed against the land. He was no party to it. The consent, however, binds the

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mortgagor Camp, and he cannot object to the payment of Duke's mortgage from the proceeds of the sale.

[2.] The notice given at the sale, cannot bind either Duke, who has a right to proceed against the land, or those holding junior judgments against Camp, or protect the purchaser against them, if by reason of the want of a waiver by Duke, of his mortgage lien on the land, it did not bring its value at the sale. The notice did not proceed from parties having authority to give it. Duke has an unquestionable right to have his mortgage paid in some way, and the Court below ordered it to be paid.

[3.] After the extinguishment of Duke's mortgage and the executions above mentioned, excepting the Newton & Nolan execution, and the execution of Wiley & Co., both of which are assigned to Bancroft, Betts & Marshall, the mortgage of Bancroft, Betts & Marshall, is the oldest lien on the land sold, and it was competent for the mortgagor Camp to consent to the money arising from the sale of the land to be applied to that, and it was also competent for the mortgagee to waive the lien of that mortgage at the sale.

[4.] The mortgages of Duke, and Bancroft, Betts & Marshall cannot, however, claim any part of the fund in Court arising from the sale of property not embraced in the mortgages.

[5.] In respect to the execution in favor of Newton & Nolan, administrators, assigned to Bancroft, Betts & Marshall, we will say that the assignees had a right, if they thought proper, to refuse to receive money on it, and to withhold it from a participation in the fund in Court. If the rights of a *bona fide* purchaser of property from the defendant, or of a security, however, are affected by its withdrawal, a question may arise upon that hereafter, and the same remark may apply, so far as *bona fide* purchasers are concerned, in respect to the Wiley & Co. execution.

As it is insisted that the rights of all the execution creditors of Camp, came up under the exceptions of the Sheriff,

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and as those who hold junior executions against Camp, have a right to have older liens extinguished, as far as the proceeds of Camp's property exposed fairly to sale will extinguish them, they would have a right to investigate the circumstances of the sale of the mortgaged land, even if Duke were to acquiesce in it. We have ordered a proceeding by which that may be done.

Under the facts presented in this record, the order of the Court below as passed, would give the money to the parties entitled to it, but inasmuch as it is not as explicit as it might be, we have determined to affirm it with the modifications and directions which we add. We have availed ourselves of the extreme latitude allowed, to determine and enforce the equitable rights of parties, on money rules against the Sheriff.

We accordingly affirm the judgment of the Court below, but with the following modifications and directions.

That from the money that arose from the sale of the property not embraced in the mortgage, the *fi. fas.* of Alpheus Benham and Kinchen P. Tyson, and Warren W. Woodruff, be immediately satisfied and the remainder of the money if any, be applied to the *fi. fa.* of Andrews & Little for the use of L. M. Wiley & Co.

That so much of the money as arose from the sale of the mortgaged land as may be sufficient to satisfy the Bancroft, Betts & Marshall mortgage, be paid in satisfaction thereof; and of the balance of the proceeds of the sale of said land, a sufficient amount be retained to pay the principal, interest and costs of the Duke mortgage, and if any remain, that it be applied first to the payment of the execution of Andrews & Little for the use of L. M. Wiley & Co., and then to the executions of junior date, according to their respective liens.

That the sum above directed to be retained, be held up, until the result of an enquiry, which the Court below is hereby directed to make, be known to the Court, viz: what the fair market value of the mortgaged land was on the day it was sold, and if it be found that the price at which it was

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sold, was equal to, or more than the fair market value thereof, that the Court then order the whole of this retained sum to be paid to the Duke mortgage.

If the result be to show that the land was sold for less than the fair market value, and for less by a sum equal to the amount of the Duke mortgage at the time of the sale, then that the Court order the Duke mortgage to proceed against the land, and order the money retained to be paid to the unsatisfied executions in the order of their priorities.

If it be found that the price at which the land was sold was less than the fair market value of the land, and less by a sum smaller than the amount due upon the Duke mortgage, at the time of the sale, then the Court will order the said mortgage to make the smaller sum out of the land, and to receive the rest of its money from the sum directed to be retained, and the balance of said retained sum to be paid to the unsatisfied *fi. fas.*, agreeably to the order of their priorities.

It is however to be understood that the right of Duke to proceed at once against the land with his mortgage is not to be obstructed, against his consent, by the proceedings herein directed, unless he refuse to receive the full amount of his mortgage on its being tendered by Bancroft, Betts & Marshall.

Judgment affirmed, with directions.

No. 8.—SAMUEL LONG, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] On the trial of a person charged with an offence, it is error to admit a part of his confession, and exclude the other part.

[2.] Proof that a person is a gambler is not admissible to impeach his testimony.

Long vs. The State of Georgia.

Indictment, from Butts Superior Court. Tried before Judge GREEN, at December Term, 1856.

Samuel Long was indicted for stealing a horse at the Indian Springs, in the county of Butts, on the twenty-second day of June, 1856, belonging to Albert S. Rose.

Samuel Whittle, a witness for the State, among other things, testified, that defendant was in possession of a horse in South Carolina, about the first of July, 1856, when witness, with others, arrested him on suspicion, and that he offered to sell said horse to witness' father for eighty dollars. Upon the cross examination, prisoner's counsel asked witness to state all that was said by prisoner at the time he offered to sell the horse for eighty dollars. Solicitor General for the State objected to the question, which objection was sustained, and the evidence sought to be introduced repelled, and prisoner's counsel excepted.

Albert S. Rose was sworn for the State, who testified, that he was the owner of the horse stolen.

Bryan W. Collier, for the State, after his examination in chief, was, upon his cross examination, asked to state what was the avocation or professional calling of Rose, the owner of the horse; the object being to prove that he was a professional gambler, and that such was his employment while at the Springs, when his horse was alleged to have been stolen. Counsel for the State objected to that fact being proved by Collier, until Rose himself should be first examined on that point, which objection was sustained by the Court, and defendant excepted.

The State having closed, defendant's counsel called Mr. Rose, and proposed to show by himself that he was a professional gambler, when it appeared that Rose had left and could not be found, whereupon, defendant moved for a continuance of the case until the attendance of said Rose could

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be procured, which motion the Court refused, and defendant excepted.

The jury found the defendant guilty. And thereupon, he moved for a new trial, making the decisions aforesaid excepted to, the grounds of his motion.

The Court refused to grant a new trial, and defendant's counsel excepted.

BAILEY, for plaintiff in error.

Sol. Gen. LYON, represented by HAMMOND, for defendant in error.

By the Court.—BENNING J. delivering the opinion.

[1.] "In the proof of confessions, as in the case of admissions, in civil cases, *the whole of what the prisoner said on the subject at the time of making the confession, should be taken together.*" 1. *Green. Ev.*, § 218.

Therefore, the question which the counsel of the accused asked the witness, Whittle, was a *legal* question; consequently, it was a question which the Court should not have rejected.

But the Court did reject it, and the rejection was made one of the grounds of the motion for a new trial. And we think that the ground was a good one. The new trial Act of 1854, says that it shall be obligatory on the Superior Courts to grant new trials in all cases in which "any evidence may be illegally withheld from the jury;" and that, if the Superior Courts fail to grant a new trial in such cases, this Court shall grant one. *Acts of 1853-4*, 46.

For the rejection of this question, therefore, this Court is forced to say, that there must be a new trial.

[2.] If the object of the question put to Collier, was to impeach Rose's testimony, the question was not the proper one; that

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would have been a question relating to Rose's *general character*.

If the object was to lay a foundation for the conclusion, that the accused *won* the horse from Rose, the question was not one that could lay such a foundation, draw what answer it might, from the witness. Proof that Rose was a gambler, would not, of itself, have authorized the jury to infer that the accused won the horse from him at some game.

We think, therefore, that the Court was right in rejecting the question put to Collier.

And, if the Court was right in doing that, the Court was of course, right in overruling the motion for a continuance; the only object of that motion being, to procure testimony to prove that Rose was a gambler.

Judgment reversed.

No. 9.—SAMUEL R. WEEMS et al, plaintiffs in error, vs. HENRY G. ANDREWS et al, defendants in error.

Whether advancements by a father to a child, made before or after the making of a will, shall adeem a legacy or residuary portion, is always a question of intention, and if there be an express declaration to that effect, the advancement must be counted.

In Equity, from Henry Superior Court. Decision by Judge GREEN, at Chambers, 25th July, 1856.

The bill in this case, was filed by Samuel R. Weems and Henry G. Andrews as executors of the last will and testament of Samuel Weems, deceased, to obtain the construction by the Court of Equity of certain clauses in said will in connection with certain deeds executed by said testator prior to the making of his will, and for the purpose of getting the instruc-

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tion and direction of the Court as to the payment and distribution of the residuum of testator's estate.

Testator, on the 11th February 1851, by deed, granted and conveyed to his son Samuel R. Weems, certain lands "*as a part of his legacy, to be valued at the sum of \$805 00.*" By deed of the same date, he conveys to his son Thos. D. Weems, certain other lands "*to be valued in his legacies as a part of his legacy, to the amount of \$1155 00.*" By deed, dated 5th Sept., 1843, he conveys certain lands to his son Bartholomew J. Weems "*as an advancement inter vivos, valued at \$1500;*" and at the conclusion of said deed adds, "*and the said Bartholomew J. Weems, by his acceptance of said deed, agrees to receive the said parcel of land at the price of \$1500, as a part of his distributive share of his father's estate in case his said distributive sum amounts to that sum, or more. But in case the said sum of \$1500 should be more than his distributive share, then he binds himself by his said acceptance of this deed, to refund to the other heirs of said Samuel Weems, as much as the said sum exceeds his share.*"

Samuel Weems, afterwards, duly executed his will, and after providing for the payment of his debts, and disposing of the greater portion of his estate by specific devises and bequest to his children and grand children, he, in the 10th clause of his will, disposes of the residue as follows, to-wit:

"I will that all of my estate, both real and personal, not otherwise disposed of, be sold by my executors, and my notes and accounts collected, and the nett proceeds thereof to be equally divided between my six children, to wit: Bartholomew J. Weems, Samuel R. Weems, Thomas D. Weems, Peggy Ann Cox, (her part expressed in the fifth item,) Martha Murray, and Malinda Andrews, provided, nevertheless, that said Samuel R. Weems shall have in trust for Peggy Ann Cox, one hundred dollars off of Bartholomew J. Weems' part, and one hundred dollars off of Samuel R. Weems' part of said division, said money at the death of said Peggy Ann Cox

to be divided as the balance of the money, between her two children.

He appoints his son Samuel R. Weems, and his son-in-law, Henry G. Andrews, his executors.

The prayer of the bill is for a construction of said will and deeds, and for directions to the complainants, as executors, how to pay out the funds resulting from the sale of property and collection of debts, under said residuary clause.

The decree of the Chancellor was, "that the sum of \$1155 00 now in the hands of Thomas D. Weems, as appears from annexed deed—and the sum of \$805 00, now in the hands of Samuel R. Weems as appears by annexed deed; and the sum of \$1500 00, now in the hands of Bartholomew J. Weems as appears by annexed deed, be and the same is hereby decreed to be part and parcel of the residuary fund of said estate, so far as to require the said executors to advance to the other legatees out of the residuary fund, an amount equal to said amounts so in their hands; also, advance Samuel R. Weems and Thomas D. Weems equal with Bartholomew J. Weems, and if the residuary fund shall be insufficient, then those now advanced be required to refund until all can be made equal sharers in the residuary fund.

And it is further ordered and decreed that Peggy Ann Cox receive an equal portion of said residuary fund, to be held in trust in the same way and with the same restrictions and limitations as provided and directed for her specific legacy in the fifth item of said will.

And it is further ordered and decreed, that said executors pay to Samuel R. Weems in trust for Peggy Ann Cox during her life, and to her two children at her death, one hundred dollars off of the residuary portion of Bartholomew J. Weems' portion, and one hundred dollars likewise in trust off of the residuary share of Samuel R. Weems."

To which judgment and decree, counsel for Samuel R., Thomas D. and Bartholomew J. Weems, excepted.

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DOYAL & NOLAN, for plaintiffs in error.

STARKE, for defendant, in error.

By the Court.—LUMPKIN, J. delivering the opinion.

In the view the Court takes of this case, there is not much difficulty about it.

The testator in his lifetime advanced to his three sons, certain unequal portions in real estate. He fixes its value, and directs that it be counted in the final distribution of his estate, not only for the purpose of equalizing this three sons with the rest of his children, but with each other.

It has been questioned whether advances made before the making of a will, will adeem a legacy or a residuary portion given by the will. The case of *Upton and Prince*, reported in *Tem. Talbot*, p. 71, decided the affirmative of this question; and this precedent has not only never been overruled, but is cited by Williams on Executors, and in other text books and adjudicated cases with approbation. In *Rogers vs. French*, 19 *Geo. Rep.*, 316, this doctrine was recognized. In that case the question was, whether \$500 advanced to one of the children of the testator, several years before the making of his will, should be deducted from the portion of that child under the residuary clause of the will. We held that it should not, upon the ground, that the proof showed, that it was not so intended, by the testator, and the Court there laid down the rule, that in all cases the question of whether advances made before or after the making of the will, should be counted, *was one of intention*.

In the case before us, there can be no doubt as to the intention of the testator. It was plainly declared in the first deed made some eleven years before his will was written, and repeated in each of the two deeds made eight years thereafter, to the other two sons, some three years before the will was written:—thus establishing the settled purpose of the testator as to this point.

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Had he simply made deeds to each of his three sons, to these several tracts of land, although of unequal value, and said nothing more, and then have given them equal portions of the residuum of his estate by his will, in the absence of any other testimony these would have been considered gratuities, merely, to his three sons. As it is, they cannot be so held in the face of the express declaration of the father to the contrary.

When we reflect that the law does not favor double portions to those standing in the same degree of relationship to the deceased ancestor; and that our statute, with regard to advancements and distributions, is founded in the plainest principles of natural justice, we cheerfully affirm the judgment of the Circuit Court.

Judgment affirmed.

No. 10.—JOHN DOE, ex dem., ELISHA HINDSMAN and others, plaintiffs in error, vs. RICHARD ROE, casual ejector, and COLUMBUS WORTHEN, tenant in possession, defendant in error.

[1.] A charge of the Court, unsustained by the evidence in the cause, is error.

[2.] When a part of an entire tract of land is conveyed by the number of acres, and not by metes and bounds, and the line separating it from the balance of the tract is to be run, the statute of limitations does not begin to run until the division is made, unless there had been undisturbed possession for so great a length of time as to create a legal presumption that there had been a division.

Ejectment, from Coweta Superior Court. Tried before Judge BULL, at September Term, 1856.

This was an action of ejectment brought by John Doe, ex

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dem., Elisha Hindsman, against Richard Roe, casual ejector, and Columbus Worthen, tenant in possession, for a portion of lot of land No. 231, situated in the county of Coweta.

It appeared from the testimony, that Charles Evans, under whom defendant claimed, went into possession of half the lot in dispute, in the year 1842, under a bond for titles from Hiram Camp; in 1847 Camp made a deed of the land to Evans and took up his bond and destroyed it. Evans remained in possession until 1852, claiming half the lot, when he sold it to S. W. Lee, the present owner and real defendant, Worthen being his overseer in possession of the premises. In 1845 the lot was divided by a surveyor, between Evans and Hindsman, and the line was run at their request. The deed from Camp to Evans dated in 1847, conveyed the east half of said lot, that is one hundred and one-fourth acres, and specifying that said lot was to be equally divided by a line to be run north and south. The deed from Evans to Lee also conveyed *one-half* of said lot, that is one hundred one and one-fourth acres. In November, 1852, James H. Graham, a surveyor run the dividing line and found it incorrect. Hindsman was present, and Graham being afterwards asked by him if he would swear to that line, Graham said he would rather run that line again; he run it and found that the original line was wrong and that defendant, or rather Lee, had in his possession five acres more than half the lot. This last survey was very accurately made. Hindsman then instituted this suit for the recovery of the five acres claimed and in the possession of Lee.

The presiding Judge charged the jury, that if the defendant, and those under whom he claimed and held, had been in the uninterrupted adverse possession of the land in dispute, under color of title for seven years before the commencement of the action, the plaintiff's right was barred. That if no title had been shown in the plaintiff, and no authority to divide the lot, the division originally made could

not bind the party having the legal title, but that this did not prevent the statute of limitations from running in favor of Evans, if he held the premises, up to the line designated, adversely under color of title. That a discrepancy of a few acres in the quantity specified in the deed and the actual quantity in possession made no difference, if the premises, held under the bond or deed, were distinctly defined and bounded by ascertained limits. Plaintiffs' counsel requested the Court to charge the jury, that defendant's deed was not color of title to the five acres in dispute, inasmuch as defendant's deed only called for $101\frac{1}{2}$ acres, and he being in possession of $106\frac{1}{2}$ acres; which charge the Court refused to give. Plaintiffs' counsel requested the Court to charge the jury, that if they believed from the evidence, that it was specified in the deed from Camp to Evans, that the land was to be equally divided, the statute could not commence to run until said division; which charge the Court refused to give, but charged, that if it was so expressed in the deed, this would not affect the operation of the statute of limitations, if before the execution of the deed, Evans held the premises, distinctly bounded and marked out, under a bond for titles from Camp, from whom he obtained possession. The Court also refused to charge as requested by plaintiff's counsel, that the statute of limitations could not commence to run from the time of the division in 1845, nor until the error in that division was known; (the Court remarking that this made no difference, and not being willing to assume that there was error.)

The Court was also requested by plaintiff's counsel to charge, that if they believed that defendant had possession of the five acres, and had shown no color of title thereto, the simple possession would not protect him, unless seven years had elapsed before the passage of the act of 1852; which the Court refused to charge, there being no evidence of any *five acres* separate from the other or balance of the premises held by defendant, and having already charged that, unless the

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defendant, and those under whom he claimed, had been in the continuous, uninterrupted and adverse possession of the *premises in dispute*, under color of title, for seven years before suit brought, that plaintiff was not barred.

To which charges and refusals to charge plaintiff's counsel excepted.

The jury found for the defendant and counsel for plaintiff upon the exceptions taken, tenders his bill of exceptions, &c.

SIMS, represented by POWELL and B. H. HILL, for plaintiff in error.

BUCHANAN, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

This ejectment was brought for the recovery of about five acres of land, claimed as a part of the eastern half of tract of land No. 231, in the 2d district of Coweta county. Some of the demises are for the half lot, but the contest is for a few acres only. The defendant pleads the statute of limitations. The action was instituted on the 14th day of February, 1853. There was a demise from Joseph W. Walton, the grantee of the entire tract of land. To support this demise, the grant from the State of Georgia to Joseph W. Walton was introduced. The plaintiff offered no other title.

The defendant's title deeds show that only one hundred one and one-fourth acres of land were claimed by him. The whole tract contained two hundred two and a half acres. The possession claimed by Evans, under the bond for titles and deed from Camp, was of half the lot of land only. The deed from Camp to Evans, was for half the tract of land, and stating that *it was to be divided north and south*.

The line previously run was not recognized by the contracting parties. There was no specified, defined boundary

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between the two parts of the lot. That was an open imaginary line to be settled and adjusted at the convenience of the parties. The deed from Evans to Lee says nothing about the line, but conveys one hundred one and one-fourth acres of land. The deed from Camp to Evans, through which he claims, was notice to him that the line was to be run after that. Accordingly, in the latter part of the year in which S. W. Lee purchased the land, the line was run, the son-in-law of Mr. Lee and the tenant in possession being with the surveyor, and it was found that the line which had been run before the deed, and not recognized between the parties, had been incorrectly run. This line was run in 1852. In 1853 the same surveyor re-surveyed the land and found that the defendant had in his possession five acres more than half the lot of land.

[1.] Upon looking carefully through the evidence we find nothing to warrant the charge given by the Court to the jury, that the fact of no title being shown in Hindsman, one of the lessors of the plaintiff, and that no authority was shown for making the division between him and Evans, did not prevent the statute from running in favor of Evans, *if he held the premises up to the designated line adversely under color of title*. Neither of the deeds designated a line; Camp says that Evans claimed half the land; Henry Evans said that Charles Evans went into possession of, and claimed one half of the lot in 1842, and continued in possession up to 1852. In 1845 he saw marks on trees made in dividing the land, but the written evidence—the deed accepted by the parties—evidence which is better than the frail recollection of witnesses, shows that that line, whenever and wherever run, was not recognized as the dividing line. On the contrary, it shows that it was not, for by the deed, the line *was to be run*. The line run by Johnson in 1845 was repudiated for some unexplained reason, and no witness speaks of a *designated line*, up to which the defendant, or any one under whom he claimed, held the land.

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[2.] The charge of the Court to the jury that "a discrepancy of a few acres between the quantity specified in the deed and the actual quantity in possession, made no difference, if the premises under the bond or deed were distinctly defined and bounded by ascertained limits," for the same reason, was erroneous. The deeds did not define the bounds by ascertained limits. They were to be ascertained afterwards. Indeed, the conveyance was of a part of a tract of land, which entire tract was defined by metes and bounds, but the part conveyed was described by the number of acres to be taken from that entire tract, and the statute of limitations could not begin to run, according to the terms of the deed, until the line was run, or until there had been an actual undisturbed possession for so great a length of time as to create a legal presumption, that the division had been made. The conduct of the parties, in running the line in 1852, repels any such presumption. For these last reasons the Court ought to have given in charge to the jury the request of the plaintiff's counsel, that if the jury believed from the evidence, that it was specified in the deed from Camp to Evans that the land was to be divided equally, the statute of limitations did not begin to run until it was divided.

Judgment reversed.

No. 11.—SOLOMON S. BRIDGES and JOHN WILLIAMS, garnishees, plaintiffs in error, vs. ANTHONY NORTH, et al., defendant in error.

[1.] Garnishees answered, that they had the estate of Travis N. in their hands, and that Thomas N., the debtor, was a legatee of Travis N., and that they could not say whether they had any effects of Thomas N. or not.

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Held, That this answer did not authorize the Court to give judgment against them.

[2.] Garnishment lies in a suit on a dormant judgment.

Certiorari, in Coweta Superior Court. Decision by Judge HAMMOND, at September Term, 1856.

An attachment was issued, and returnable to a Justice's Court, by Anthony North, against Thomas J. Nichols, an absent debtor, upon a *dormant* judgment. Soloman S. Bridges and John Williams were served with summons of garnishment, and required to answer what property or effects of said absent debtor they had in hand, or whether they were indebted to him. The garnishees appeared and answered that they had the effects or estate of *Travis Nichols*, deceased, in their hands, to the amount of eight thousand dollars; that they could not say that they had any effects of Thomas J. Nichols, one of the legatees, in their hands; they might or might not have.

Upon this answer, the Justice gave judgment against the garnishees for the amount of plaintiffs demand, and cost of suit: To which judgment garnishees excepted, and brought said judgment for review and reversal, by certiorari, before the Superior Court.

Counsel for garnishees made the following objections to the judgment of the Justice's Court:

1st. That plaintiff could not proceed by attachment and garnishment on a *dormant* judgment or execution.

2d. That plaintiff did not make the proper affidavit to obtain garnishment, after judgment obtained.

3d. That the answer of the garnishees is binding on plaintiff, and final, if it is not traversed and denied, and that the Justice erred in giving judgment against them, on their answers.

The presiding Judge overruled the objections; held the answers too equivocal; confirmed the judgment and dismiss-

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ed the certiorari: To which ruling and judgment, counsel for garnishees excepted, and assign error.

POWELL; and B. H. HILL, for plaintiff in error.

BUCHANAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the answer of the garnishees such as to authorize the Court to render a judgment against them?

In order that a judgment may lawfully go against a garnishee, he must be "indebted" to the debtor, or must have in his hands "effects" of the debtor. *Cobb's Dig.* 70.

And a Court is not authorized to say that the garnishee is a debtor to the debtor, or is the holder of effects of the debtor, unless the garnishee admits that he is; or denies that he is, and it is proved on him that he is; or stands in contempt of a *rule nisi* to answer. *Cobb's Dig.* 70, 83.

Did the garnishees in this case, admit that they were debtors to the debtor, or holders of effects belonging to him?

They did not, unless saying that they had in their hands the estate of Travis Nichols, and that Thomas J. Nichols, the absent debtor, was one of the legatees of Travis Nichols, and therefore that they might or they might not have effects belonging to Thomas J. Nichols, was such an admission. This was all they said, and in this they did not say what was the size of the legatee's legacy, nor whether it had been assented to, nor whether there were not debts enough against the testator, Travis Nichols, to consume his whole estate.

But if the legacy had not been assented to, or if the debts against the estate were sufficient to consume the estate, the garnishees had no effects of the legatee in their hands, subject to garnishment.

What the garnishees did say then, was not an *admission* by them, that they had effects of the debtor in their hands.

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In truth, the answer was defective. It wanted fullness. It should have contained matter enough to make it *certain* in law, whether the interest of the debtor in the estate was such as was or was not subject to garnishment. And it might have been excepted to, for such defectiveness.

But it did not contain what was equivalent to an admission, that the garnishees held effects of the debtor that were subject to the garnishment. What it contained was rather equivalent to a denial of their having such effects? *Prima facie*, the interest of a legatee is not the subject of a garnishment issued against the executor. *Serg. on Attach.* 86. These garnishees were executors; either executors by right, or by wrong.

The case obviously does not fall within either the second or the third class of the cases aforesaid, in which alone a Court is authorized to give judgment against the garnishee.

[1.] We think therefore, that the Court below erred in affirming the judgment of the Justice of the Peace.

[2.] We have no doubt that a garnishment may issue in a suit founded on a dormant judgment. Such a suit must stand on the same footing as other suits, the object of which is to recover a debt. Indeed the Act of 1834, authorizes plaintiffs to issue garnishments "in all cases whatsoever," "whether the subject matter of the suit be a debt or not." *Cobb's Dig.* 84.

And that there may be an action of debt on a dormant judgment, is decided by *Lockwood vs. Barefield*, 7 *Ga. Rep.* 393.

The other ground of objection to the judgment was not insisted on.

Judgment reversed.

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No. 12.—JOHN DOE, ex dem. of ZACHARIAH HESTER, plaintiff in error, vs. RICHARD ROE, casual ejector, and CALVIN COATS, tenant in possession, defendants in error.

- [1.] A Sheriff's deed, and possession under it, unaccompanied with the judgment or execution, is good color of title, as a starting point for the statute of limitations.
- [2.] The interest to exclude a witness, must appear affirmatively to be fixed and certain.
- [3.] Where a Sheriff's deed unaccompanied with a judgment or execution although good as color of title for the starting of the statute of limitations—still, possession under it, cannot be connected with any previous possession, so as to constitute a good statutory bar.

Ejectment, from Heard Superior Court. Tried before Judge HAMMOND, at August Term, 1856.

This was an action of ejectment, brought by Doe, on the demise of Zachariah Hester, against Roe, casual ejector, and Calvin Coats, tenant in possession, for the recovery of a lot of land situated in the county of Heard.

Plaintiff offered in evidence, a plat and grant from the State of Georgia to Zachariah Hester, for the lot of land in dispute; proved the *locus in quo*, and the possession of defendant at the commencement of the suit, and closed.

Defendant offered in evidence, a Sheriff's deed to William B. Dent for the same land. Plaintiff objected to the introduction of this deed as evidence, because no connection or privity was shown between Hester and the defendant, James Bell, in the execution under which the Sheriff sold the land to Dent; and because no judgment or execution was offered in evidence against Bell, nor did it appear that he was in possession of the land at the time it was sold. The Court ruled out the deed as evidence of legal title, but admitted it as color of title, to which decision plaintiff excepted.

Defendant then introduced *Nicholas Tompkins*—plaintiff objected to his competency, on the ground that he was the administrator of Giles S. Tompkins, who claimed a third of

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the land in dispute, being a joint owner with Dent and Winston Wood, and that Coats, the defendant in the suit, was in possession as their tenant. The Court overruled the objection, and plaintiff excepted.

The defendant then proved by Tompkins, that Bell was in possession of the land in 1840 or 1841; that he went to where Bell and Allen Lambert were digging gold on the lot, and that Coats was now in possession as tenant of Dent, Wood, and witness as administrator.

William B. Tompkins, a witness for defendant, testified, that after the date of the Sheriff's deed to Dent, about November 1842, Allen Lambert was in possession, who told witness he held under Winston Wood. Defendant here closed.

Plaintiff, in reply, offered in evidence, the record of a former suit between the same parties for the same land, which was dismissed at November Term 1851, and showed that the present suit was commenced within six months thereafter.

The testimony here closed, and the Court charged the jury, that to entitle the plaintiff to recover, he must show title in himself, and that a grant from the State was a good title, and sufficient to authorize a recovery.

Plaintiff's counsel requested the Court to charge, that there being no judgment or execution shown against James Bell, in support of the Sheriff's deed to Dent, those taking possession under said sale and deed, were trespassers upon Bell's possession, and antagonistic thereto by ousting him by an illegal and fraudulent sale, purporting to have been made by the Sheriff; which charge the Court refused to give, but charged the jury that defendant's possession under the Sheriff's deed might be coupled with Bell's possession for the purpose of showing a *continuous* possession of seven years under the statute of limitations, to which charge and refusal to charge, plaintiff excepted.

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The jury found for the defendant; plaintiff's counsel tenders his bill of exceptions and therein assigns as error, the rulings, charges and refusal to charge, excepted to above.

MABRY & WRIGHT, for plaintiff in error.

OLIVER and **B. H. HILL**, for defendants in error.

By the Court.—**LUMPKIN, J.** delivering the opinion.

This was an action of ejectment, to recover lot No. 274 in the 9th district of what was originally Carroll, now Heard county. The plaintiff, Zachariah Hester, introduced a grant from the State to himself; proved the *locus* and the possession of the defendant at the commencement of the action, and closed his case.

The defendant offered in evidence, a Sheriff's deed to the lot of land, made to Wm. B. W. Dent. This testimony was objected to on the ground, that no judgment or execution against Bell—as whose property the land purported to have been sold—had been shown, or that Bell was in possession at the date of the sale.

The Court ruled out the deed as legal title, but allowed it to go to the jury as color of title, and this is the first error complained of.

[1.] In *Beverly et al vs. Burke* 9 *Geo. Rep.* 440, this Court held, that the Sheriff's deed alone, unaccompanied by either the judgment or the *fi fa*, was sufficient to constitute color of title:—that is to be a starting point from which the statute of limitations might begin to run, provided the purchaser went into possession under it. We adhere to that opinion.

[2] Nicholas Tompkins was next tendered as a witness, and objected to on the ground of interest. He was the administrator of Giles S. Tompkins, deceased, who owned one-third of the land in dispute; that Coats, the tenant, was put upon the land by Dent, Wood and the witness as administrator;

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and that as administrator he had employed counsel, and was responsible for their fees.

The Court held, that it did not affirmatively appear, that Tompkins was incompetent by reason of his interest; and therefore he was permitted to testify, and we see no error in the ruling. A naked trustee is excluded when a party to the record, because liable for cost, otherwise, the burden is upon the objector to demonstrate that he has such a certain and fixed interest, as to disqualify him. He may or may not be liable over, representatively, to Coats, in case of eviction. He is only bound representatively for attorney's fees.

[3.] It only remains to notice the charge requested by plaintiff's counsel, and that given by the Court.

The Court was asked to instruct the jury that no judgment or execution having been shown against Bell, that the Sheriff sold, if at all, without authority, and that Dent and others who took possession under the Sheriff's deed, were trespassers on Bell's possession, and that they could not connect their possession with Bell's.

This charge the Court refused to give, but on the contrary, instructed the jury, that the possession of Dent and others, might be connected with Bell's, for the purpose of making out a statutory title. Was the Court right?

First, as to the request to charge. If no authority was shown in the Sheriff to sell the land, while it may be true, as decided in *9th Ga. Rep.* that a mere Sheriff's deed may be enough to lay the foundation for the statute to begin to run, still, if the Sheriff had no authority to sell, and such is the legal presumption in the absence of proof, would not those who went into possession under the Sheriff's deed, be trespassers, even against the alleged defendant in execution? The Sheriff's deed unaccompanied by a judgment or execution, is no more than the deed of any other individual, *Simpson vs. Downing*, 23 *Wendell*, 316. Be this as it may, the nature of Bell's possession being unexplained, that is, it not appearing to have been adverse to that of the true owner,

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and no authority having been shown in the Sheriff to sell, we are clear, that the possession of Dent and others cannot be connected with that of Bell, so as to oust Hester, and that therefore the charge of the Court, as given, was manifestly erroneous.

Judgment reversed.

1704 No. 13.—JAMES H. ROGERS, plaintiff in error, vs. SANDFORD KINGSBURY, defendant in error.

A Court of Equity does not relieve a person from a judgment which he might have prevented but for his own negligence

In Equity, from Carroll Superior Court. Decision by Judge HAMMOND, at Chambers, 30th October, 1856.

The bill alleges that the defendant Sandford Kingsbury brought an action for slander against the complainant, James H. Rogers, returnable to April Term, 1850, of Carroll Superior Court.

That in order to expedite the cause, and bring it to a final trial, complainant confessed judgment to defendant for *five hundred dollars*, reserving the right of appeal, and that it was the understanding of all the parties and attorneys in the case, that complainant's defence to said suit would not be impaired or in the least prejudiced by said confession. The case was transferred to the appeal, and was continued from term to term, until December term, 1855, when a motion was made to dismiss said appeal on the ground, that the *affidavit* of inability to pay cost, made by complainant, to enable him to appeal in *forma pauperis*, was insufficient and defective; said motion was granted by the Court, and the ap-

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peal dismissed. Complainant's attorney excepted to the decision, and the bill of exceptions and all the papers, necessary to bring the case up to the Supreme Court, were prepared and signed, but owing to some mistake in the Clerk, said bill of exceptions and papers were not transmitted within the proper period to the Supreme Court, and the judgment of confession for five hundred dollars remains in full force against complainant, and the said Kingsbury is proceeding to enforce its collection. The bill prays that the defendant be enjoined from collecting and enforcing said judgment, that the same be set aside, and that complainant be allowed a trial on the merits.

Upon application to the Judge at chambers, he refused to sanction the bill and grant the injunction prayed for; to which decision complainant excepted, and assigns said refusal as error.

LATHAM, for plaintiff in error.

BUCHANAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The writ of error would have furnished a corrective for the errors complained of in the bill. But the benefit of the writ of error was lost to the complainant by his own *negligence*. If he had applied to this Court for a mandamus against the Clerk, at the term to which his writ of error was returnable, he would have saved the return of his case. But he never applied for a mandamus at any term, and he gives no excuse for never having applied for one. We must impute it to his negligence therefore, that he did not get a mandamus, and consequently, we must impute it to his negligence, that he missed having his case heard in this Court.

Now a Court of Equity will not relieve a party from a judgment which he might have prevented, but for his own *negligence*.

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and no authority having been shown in the Sheriff to sell, we are clear, that the possession of Dent and others cannot be connected with that of Bell, so as to oust Hester, and that therefore the charge of the Court, as given, was manifestly erroneous.

Judgment reversed.

11704 NO. 13.—JAMES H. ROGERS, plaintiff in error, vs. SANDFORD KINGSBURY, defendant in error.

A Court of Equity does not relieve a person from a judgment which he might have prevented but for his own negligence

In Equity, from Carroll Superior Court. Decision by Judge HAMMOND, at Chambers, 30th October, 1856.

The bill alleges that the defendant Sandford Kingsbury brought an action for slander against the complainant, James H. Rogers, returnable to April Term, 1850, of Carroll Superior Court.

That in order to expedite the cause, and bring it to a final trial, complainant confessed judgment to defendant for *five hundred dollars*, reserving the right of appeal, and that it was the understanding of all the parties and attorneys in the case, that complainant's defence to said suit would not be impaired or in the least prejudiced by said confession. The case was transferred to the appeal, and was continued from term to term, until December term, 1855, when a motion was made to dismiss said appeal on the ground, that the *affidavit* of inability to pay cost, made by complainant, to enable him to appeal in *forma pauperis*, was insufficient and defective; said motion was granted by the Court, and the ap-

Rogers vs. Kingsbury.

peal dismissed. Complainant's attorney excepted to the decision, and the bill of exceptions and all the papers, necessary to bring the case up to the Supreme Court, were prepared and signed, but owing to some mistake in the Clerk, said bill of exceptions and papers were not transmitted within the proper period to the Supreme Court, and the judgment of confession for five hundred dollars remains in full force against complainant, and the said Kingsbury is proceeding to enforce its collection. The bill prays that the defendant be enjoined from collecting and enforcing said judgment, that the same be set aside, and that complainant be allowed a trial on the merits.

Upon application to the Judge at chambers, he refused to sanction the bill and grant the injunction prayed for; to which decision complainant excepted, and assigns said refusal as error.

LATHAM, for plaintiff in error.

BUCHANAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The writ of error would have furnished a corrective for the errors complained of in the bill. But the benefit of the writ of error was lost to the complainant by his own *negligence*. If he had applied to this Court for a mandamus against the Clerk, at the term to which his writ of error was returnable, he would have saved the return of his case. But he never applied for a mandamus at any term, and he gives no excuse for never having applied for one. We must impute it to his negligence therefore, that he did not get a mandamus, and consequently, we must impute it to his negligence, that he missed having his case heard in this Court.

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Judgment reversed.

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Upon application to the Judge at chambers, he refused to sanction the bill and grant the injunction prayed for; to which decision complainant excepted, and assigns said refusal as error.

LATHAM, for plaintiff in error.

BUCHANAN, for defendant in error.

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Upon application to the Judge at chambers, he refused to sanction the bill and grant the injunction prayed for; to which decision complainant excepted, and assigns said refusal as error.

LATHAM, for plaintiff in error.

BUCHANAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The writ of error would have furnished a corrective for the errors complained of in the bill. But the benefit of the writ of error was lost to the complainant by his own *negligence*. If he had applied to this Court for a mandamus against the Clerk, at the term to which his writ of error was returnable, he would have saved the return of his case. But he never applied for a mandamus at any term, and he gives no excuse for never having applied for one. We must impute it to his negligence therefore, that he did not get a mandamus, and consequently, we must impute it to his negligence, that he missed having his case heard in this Court.

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Judgment reversed.

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Upon application to the Judge at chambers, he refused to sanction the bill and grant the injunction prayed for; to which decision complainant excepted, and assigns said refusal as error.

LATHAM, for plaintiff in error.

BUCHANAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The writ of error would have furnished a corrective for the errors complained of in the bill. But the benefit of the writ of error was lost to the complainant by his own *negligence*. If he had applied to this Court for a mandamus against the Clerk, at the term to which his writ of error was returnable, he would have saved the return of his case. But he never applied for a mandamus at any term, and he gives no excuse for never having applied for one. We must impute it to his negligence therefore, that he did not get a mandamus, and consequently, we must impute it to his negligence, that he missed having his case heard in this Court.

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Perhaps the complainant is still entitled to a motion to set aside the judgment that dismissed the appeal. I incline myself strongly to think that he is. But he has no remedy in Equity.

The judgment ought to be affirmed.

Judgment affirmed.

NO. 14.—EVERARD H. RICHARDSON, plaintiff in error vs. JOHN KEERLY, defendant in error.

The rule, as to what is the measure of damages for the breach of a bond, conditioned to make titles to a lot of land, forfeited to the State, under the Act of 1843, is that which was laid down in this case, when this case was in this Court before. *See 17 Geo. Rep., 602.*

In Equity, from Polk Superior Court. Tried before Judge HAMMOND, April Term 1856.

The facts in this case are, that John Keerly had given a bond for titles to one Harper, conditioned to execute good titles to a large settlement of land, consisting of many contiguous 40 acre lots, situated in the county of Paulding. The bond was dated 9th October 1838, and titles were to be made by the 25th December 1839, or on the payment of the last installment of the purchase money. The price to be paid for the land, was twelve dollars and a half per acre.

Harper purchased the land for defendant Richardson, and one Cowdry, who substituted their notes for Harper's, and took an assignment of Keerly's bond, and divided the land—Richardson going into possession of his part in 1838 or 1839, and has remained in possession ever since.

Keerly had executed titles to all the land except one lot, No. 796, in the 2d district, 4th section, which, in the division,

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fell or was assigned to Richardson. Keerly had no valid title to this lot—he had the conveyance from the *drawer*, but a grant had never issued, and under the Act of 21st December 1843, the lot had reverted to the State, and Richardson having applied and paid the fee of \$25 00, obtained the grant from the State to this lot.

Keerly brought suit on one of the notes given for the land, and the only one remaining unpaid, and this bill was filed to enjoin that action, and claiming that the note should be credited with the value of the reverted lot.

Complainant proposed to prove the value of lot No. 769, at the time of the breach of the contract, and also at the time of the trial, and at different times between these periods, which testimony was repelled by the Court, on the ground that it was not pertinent; that complainant could only recover, or was entitled to a credit of twenty-five dollars, the amount paid for the grant, and his necessary expenses in obtaining the same. To which decision complainant excepted.

Upon this ruling of the Court, the parties agreed upon the sum of fifty dollars, as the amount paid for the grant and expenses, to be allowed as a credit on the note.

Complainant's counsel requested the Court to charge the jury, that if they believed that Richardson had asked Keerly in good faith, to grant the lot, and Keerly refused to do so, and Richardson then granted it, that Richardson was entitled to the benefit, and they should find for complainant the value of the land at the time of the breach, and enjoin the action at law to that extent.

And also to charge the jury that by the Acts of the General Assembly regulating the granting of lots, the benefit was confined exclusively to citizens of this State, and as it was admitted that defendant was a citizen of Alabama, the granting of the lot could not enure to his benefit, but only to a citizen of this State, and that therefore, the grant fee and expenses were not the measure of damages; and that if Rich-

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ardson in good faith, purchased in the outstanding title in fee, to protect and save himself from damage, he had the right to do so, without waiting for a recovery, and the measure of damages against Keerly would be the purchase money with interest, or the *value* of the land at the time of the breach.

All of which charges the Court refused to give, but held, that the principle regulating the amount or extent of damage in this case, had been established and settled by the Supreme Court, (*see this case, 17 Geo. Rep., 602,*) and charged the jury that complainant was entitled to a deduction only to the amount paid by him for the grant and his expenses in obtaining the same. Whereupon a decree was rendered, allowing a deduction of fifty dollars from the note sued on.

To which charge and refusal to charge, counsel for complainant excepted.

A. R. WRIGHT, for plaintiff in error.

CHISLUM, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

This case was once before in this Court, and it presents the same questions now, which it presented then. And the answer that we then gave to those questions, we now again give, and with increased confidence. *17 Geo. Rep. 602.*

The argument for the plaintiff, the vendee, may be thus briefly stated:

1st. The vendee (the plaintiff,) is entitled to compensation from the vendor, (the defendant,) for his loss occasioned by the vendor's breach of his bond, whatever that loss may be.

2d. If the vendor had not broken his bond, the vendee would have acquired the whole interest in the land.

3d. The vendor broke his bond, and by reason of his doing so, the vendee was evicted in law, from the land.

4th. The vendee, by being thus evicted from the land, was

prevented from acquiring *any* interest under the bond, in the land.

5th. His loss therefore, occasioned by the breach of the bond, is a loss of the *whole* interest in the land.

6th. Nothing short of the value of the land, can be the measure of compensation for such a loss.

The first of these propositions is, no doubt true.

The same may be said of the second.

The *conclusion* from the third is not, in my opinion, true. The Act of 1843 (the forfeiting-draw act) does not, *per se*, in my opinion, work the eviction of any tenant "in possession." See section 4 of the Act, Cobb's Dig. 707. But yet, this conclusion may be admitted to be true, for the sake of the argument.

The fourth, is by no means true.

The vendor, acquired by virtue of the bond, valuable interest in the land, even if it be admitted, that he was, by the operation of the Act aforesaid, evicted from the land.

1st. He acquired, by virtue of the bond, the *preemption* right to the land, to be exercised on the terms prescribed by the act aforesaid. By virtue of the bond he became the "tenant in possession" of the land, nay the tenant in possession under the drawer, for his vendor, (the obligor,) held under the drawer. The terms of sale prescribed by the Act, were, that any of the lots contemplated by the Act, might be had for \$2000, after the first of October 1844; for \$1500 after the first of November thereafter; for \$1000 after the first of December thereafter; for \$500 after the first of January 1845; for \$250 after the first day of May thereafter; for \$100 after the first day of July thereafter; for \$25 after the first day of September thereafter; and for \$5 after the first day of January thereafter. By virtue of the bond, the vendee (the plaintiff,) acquired the *prior* right to purchase the land on these terms.

Of what value to him was this right of priority? It is impossible to tell, but it must have been of much value, if dis-

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creetly used. A discreet use of it, would, it is probable, have kept off all competitors, and it is likely that he did use it discreetly, for he bought in the land under the Act at \$25. One of two things must be true, either \$25 was the full value of the land, or although \$25 was less than its full value, he was enabled, by virtue of the advantage which his right of pre-emption gave him, to purchase it at \$25, for the land was exposed to a sort of sale, at which all citizens might become purchasers, for nearly a year before he purchased it, and yet no higher offer was made for it than twenty-five dollars.

2d. By virtue of the bond, he acquired the enjoyment of the land, and the *right* to that enjoyment, from the date of the bond until the first of October 1844, (or rather as I say, until he bought the land from the State at \$25, which was on or after the first of September 1845) a period of six years (or seven.)

What was a term of six or seven years in the land worth? It was certainly worth something, it might have been worth a good deal. The worth, whatever it was, was due to the bond—was derived from the defendant.

The proposition is not true then, that the plaintiff, by being evicted from the land, was prevented from acquiring *any* interest under the bond, in the land. A proposition far nearer the truth, no doubt, would be, that he acquired, under the bond, such an interest in the land, as enabled him to buy it for \$25.

The argument for the plaintiff, then, is not satisfactory.

There is another fact in this case, which tells, in some degree, against the plaintiff's right to recover more than his actual damage. The defendant, after selling him the land, moved into Alabama, and it was not until the 13th of August 1845, that the plaintiff wrote to him, that the lot was an ungranted one; three weeks after the date of the letter, the plaintiff had obtained a grant for the lot to himself. Why this tardiness before the date of the letter, and this haste after the date of it? Especially, may these questions be asked

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in view of the fact, that the purchase money for the lot, though long due, was lying over. If an offer to pay this had been made when it fell due, the defendant's attention would have been called to the ungranted state of the lot, and he could have taken out the grant under the old law, for the mere price of a grant.

We affirm the judgment of the Court below.

See Bush vs. Marshall, 6 How. 284.

Judgment affirmed.

No. 15.—THE MAYOR AND CITY COUNCIL OF ROME, plaintiffs in error, vs. NEILS J. OMBURG, defendant in error.

The breach of a pound and liberating a cow confined therein, is no violation of an ordinance against opposing and interrupting the Marshal in executing an ordinance which required him to take up and impound cattle strolling at large in the city.

Certiorari, in Floyd Superior Court. Decided by Judge HAMMOND, at August Term, 1856.

Neils J. Omburg, defendant in error, was fined by the Mayor and City Council of the City of Rome, twenty dollars, for a violation of an ordinance of said city, prohibiting any person from opposing or interrupting any city officer in the execution of the ordinances of said city.

The City Council had passed an ordinance, making it the duty of the Marshal to take up any horses, mules or cattle found running at large in the streets of said city, between the first day of October and April, and confine such animals in some secure place. The ordinance goes on and provides

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how the Marshal shall proceed to give notice, advertise, &c., and allows said Marshal or any other officer fifty cents for each head of cattle taken up, to be paid by the owner, or out of the proceeds of sale.

Two boys, one about 12 years old and the other about 14, found Omburg's cow lying in a back street, and near his house or residence, and drove her to a pen or pound provided by the Marshal for impounding stock taken up under said ordinance. The boys had been employed by the Marshal to take up all cows found by them in the streets, and to pen them, and he gave them fifty cents for every cow found and impounded by them. Omburg ascertaining that his cow was in said pen, went and broke the lock and took her out; and for this he was tried for violating the ordinance for opposing and interrupting any officer in the execution of the ordinances of said city.

He excepted to the order of the Mayor and Council imposing said fine, and by certiorari brought the same up for review before the Superior Court. That Court sustained the certiorari and reversed and set aside the order of said Mayor and Council. To this decision counsel for the Mayor and Council excepted and assigns error.

HARVEY & ALEXANDER, for plaintiff in error.

UNDERWOOD & SMITH, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

Conceding the power of the Mayor and Council under the Act of incorporation to pass and enforce the ordinance under which the defendant was tried and fined, it does not appear that the defendant in error had offended against it. By an ordinance of the city, the Marshal was required to take possession of, and impound any cow running at large in any of the streets of the city. Another ordinance of the city pro-

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hibited "any person from opposing or interrupting any city officer in the execution of the ordinances of said city." The defendant was tried and fined for violating the latter ordinance, on the charge of opposing and interrupting the city Marshal in the execution of the former ordinance. The cow had been impounded without opposition or interruption. The act had been completed and the ordinance executed, before the defendant committed the act which is alleged to have constituted the offence. The breach of the pound was no opposition or interruption of the officer in the execution of the ordinance. Obstructing the execution of lawful process is an offence, 4 *Black. Com.*, 129. This takes place while the officer is attempting to execute the process. An escape after an arrest, and before the person arrested is imprisoned, is another offence. *Ib.* 130. Breach of prison is a different offence, and rescue, which is forcibly freeing another from imprisonment, is a distinct offence. *Ib.* 131. It is unnecessary to consider other points made in the record, as, on the view of the case here presented, we affirm the judgment of the circuit Judge, reversing and setting aside the order of the Mayor and Council of Rome, imposing a fine on the defendant.

Judgment affirmed.

No. 16.—BAKER & WILCOX, plaintiff in error, vs. WILLIAM WIMPEE, defendant in error.

[1.] Land was bound by a mortgage, and by several general judgments younger than the mortgage. The land was worth much less than the amount of the mortgage. The mortgage was not foreclosed. The land was levied on by a *f. fa.* from one of the judgments. On the day of sale, the mortgagor and the mortgagees agreed that the land should be sold free from the encumbrance

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amount of the mortgage almost doubled the value of the property.

But even if this had not been so: even if the value of the property had exceeded the amount of the mortgage, still the agreement could not have affected the rights of the owners of the *fi. fa.*, for in that case the only effect the agreement could have had, must have been, to make the property sell for its full value; but if the property had sold for its full value, it would have sold for money enough to satisfy the mortgage, and leave a balance; and this balance would have been all that the *fi. fa.* would have been entitled to; and this it could have got, notwithstanding the agreement.

The effect of this agreement was in fact, to make the property bring its full value.

[1.] We think that the agreement was a valid one.

If the agreement was valid, its effect must have been, to make the mortgage and the *fi. fa.* occupy, as to the money, the same relation which they had occupied, as to the land. *See Byars vs. Bancroft, Betts & Marshall, p. 34, this vol.*

Was this relation such as to give to the *fi. fa.* a claim to the money of superior dignity to the claim which the mortgage had to the money?

The mortgage was older than the judgment on which the *fi. fa.* was founded; and it is a general rule, that among liens by judgment, and by mortgage, the older is the better.

Are there any special facts in the present case, to take it out of the general rule?

The special facts in this case are these:

1. The mortgagees, as the representatives of Wimpee's partner, the deceased Price, are themselves bound for the debt on which the Baker & Wilcox *fi. fa.* is founded: That debt was a debt against Wimpee and his partner, the deceased Price. This being so, ought the representatives of Price to be allowed to take money from a debt, which debt they are themselves bound for?

2. The very mortgage itself is one that was in part, given

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to save the said representatives of Price harmless from all the debts of Wimpee & Price, and therefore, from this debt of Baker & Wilcox; and if the money in question should be applied to the payment of that debt, the object of the mortgage would *pro tanto*, be accomplished: Is it not right then, that the money should be applied to the payment of the debt?

There are two or three things which, for the present are, we think, sufficient to turn aside the force of this double fact.

1st. The Baker & Wilcox *fi. fa.* is one which is against Wimpee *alone*, though it is against him as surviving partner of Wimpee & Price; therefore, it does not *bind* the administrators of Price: they, consequently, have still the right to defend themselves against the debt which the *fi. fa.* represents. And to apply this money to the payment of the *fi. fa.*, would be to deprive them of that right, for it would be paying the *fi. fa.* with their money, money made theirs by the mortgage and the subsequent agreement.

2d. The mortgage is one that was made in part, to secure the mortgagees against *all* the debts owed by Wimpee & Price. Therefore, every one of those debts has a good claim on this money, as this one due to Baker & Wilcox has; especially is this true, inasmuch as there is nothing to show, that the estate of Price, the deceased partner, is solvent. But those debts in all, amount to greatly more than the amount of the money, and there is nothing to show what their precise amount is. Therefore it is impossible to tell what is the share of the money that this Baker & Wilcox debt ought to take.

Besides, the holders of the debts other than this of Baker & Wilcox, are not parties to this proceeding, and they have the right to dispute the validity of the Baker & Wilcox *fi. fa.*

And in so complicated a case, there may be other things not occurring to us that ought to prevent a summary order

Wick vs. Willoughby.

for this money, to be first applied to the payment of the Baker & Wilcox *fi. fa.*

[2.] We therefore think, that the Court below was right in refusing the rule absolute.

But this is by no means saying, that the fund is wholly beyond the reach of the Baker & Wilcox *fi. fa.* We do not say, that that *fi. fa.* might not reach the fund by means of a bill in equity.

Judgment affirmed.

No. 17.—JOHN B. WICK, plaintiff in error, vs. JOHN WILLOUGHBY, defendant in error.

No bond need be given in case of an appeal entered *in forma pauperis*, under the Act of 1842. *Cobb* 501.

Motion to Dismiss Appeal, from Carroll Superior Court. Decision by Judge HAMMOND, October Term, 1856.

When this case was called for trial, counsel for plaintiff below moved to dismiss the appeal, upon the ground that defendant having made the usual affidavit, had entered the appeal in *forma pauperis*, without executing a bond.

The Court sustained the motion, and dismissed the appeal, and to this decision defendant excepted.

G. J. WRIGHT, for plaintiff in error.

CHANDLER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an appeal, entered under the Act of 1842, (*Cobb*

Teal vs. The State of Georgia.

501,) and dismissed because the party on entering the appeal, failed to give his individual bond ; nor would the Court permit him to amend, by executing a bond, *nunc pro tunc*. Was the Court right?

The act provides that, " where the party cast shall be dissatisfied with the decision, and shall be unable to pay cost and give security as now required by law, if such party will make and file an affidavit in writing, that he or she is advised and believes that he or she has a good cause of appeal, and that owing to his or her poverty, he or she is unable to pay the cost and give security as now required by law, in cases of appeal, such party shall be permitted to appeal without the payment of cost, and without giving security as heretofore practised in this State."

The only object in giving a bond is, to give the security required by the Act of 1799. This Court has held more than once that the appellant himself need not sign the bond, being bound already by the judgment which as to him is better than his bond. When the Act of 1842 therefore dispenses with giving security, it does in effect dispense with a bond. We think the appeal was good as it stood.

Judgment reversed.

No. 18.—MESHACK TEAL, plaintiff in error, vs. THE STATE
OF GEORGIA, defendant in error. 92/40

[1.] No irregularity in a criminal case, not affecting the real merits of the offence charged in the indictment, shall be good on a motion in arrest of judgment ; all other defects must be taken advantage of by plea, or in some other way, and at the proper time, pending the proceeding.

[2.] On the trial of a defendant for murder, it is the duty of the Court to give to the jury the definition of each grade of homicide, as regulated by the Penal Code, and also of justifiable homicide—provided the testimony will authorize it. If

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It be apparent, however, that the defendant is guilty of murder or voluntary manslaughter, or is not guilty, it is not error in the Court so to charge.

- [3.] To justify homicide, the fears of the slayer should be those of a reasonable man—one reasonably courageous, reasonably self-possessed, and not those of a coward.
- [4.] To support the plea of self-defence in a capital case, the accused must show that he took the life of the deceased to save his own. He must demonstrate that there was a necessity for the killing.
- [5.] A new trial will not be granted upon the ground of newly discovered evidence, unless it is probable that if introduced it might change the verdict.

Indictment for Murder, from Campbell Superior Court.
Tried before Judge HAMMOND, at September Term, 1856.

Meshack Teal was indicted for the murder of Robert Northcutt. The bill of exceptions sets forth, that upon the call of the case, the parties announced themselves ready for trial—a jury was empanelled, and the Solicitor General arraigned the defendant, who pleaded not guilty. The Solicitor General then read to the jury the indictment, and stated that it was founded upon a *special presentment* that he held in his hand.

The following witnesses were then sworn and examined on the part of the State :

Mrs. Mary Northcutt says: The transaction was in Campbell county, the 30th July, 1855, at the house of deceased, near sun set. The prisoner came up to the yard gate; he had a rifle gun belonging to deceased, which he had borrowed. The deceased was sitting in a chair near the door; witness was setting near him; deceased was nursing a child out of doors. Prisoner spoke first, and said to deceased, "Bob come out here I want to talk to you." Deceased's name was Robert Northcutt. Prisoner spoke loud, and appeared to be angry. Deceased turned round and said to prisoner, "Shack Teal I want you to go away from here;" prisoner replied, "Oh no, I want you to come out here;" deceased was singing at the time prisoner came up; after he

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told prisoner to go away, he sung on for about a half a minute; deceased made no reply, but put down the child and walked about half way to where prisoner was standing and then walked back into the house and took down the gun. At the time deceased turned back into the house, prisoner said something which witness does not recollect. Deceased took down a shot-gun and walked out to the fence near where prisoner was standing; there was nothing but the fence between them; deceased laid the muzzle of his gun on the fence, tapping it but not pointing it in the direction of the prisoner. Deceased told prisoner he wanted him to leave there, to go away; prisoner told deceased to come outside the gate. Prisoner cursed and swore so much witness can't recollect what he did say. Witness went into the house to lay down the baby she was nursing; before she had time to get back again, she heard the report of the rifle; witness stayed in the house several minutes; when she came out she saw deceased some four or five steps outside of the gate, and had his gun raised, snapping it, in his right hand; witness asked him what he meant, or what he was doing; witness ran out of the house as soon as she heard the report of the gun; deceased told her that Teal had killed him; she asked him if he could get in the house without her assistance; he said he could very well. She don't think she saw Teal at the time she went out to where her husband was. She then went on without turning back, to Mr. Cook's, who lived about a half a mile off; she overtook prisoner a hundred and fifty or two hundred yards from the house; prisoner was walking in a common gait towards Mr. Cook's when she first saw him; when she got near him, he broke into a run, and ran twenty or thirty yards, and then turned round far enough to see witness, and then stopped and turned into a walk. She was running as fast as she could. As she passed prisoner she told him that he had killed Mr. Northcutt; he said he expected he had, that he had shot him, and he expected he had killed him.

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This was on Monday; deceased lived until some minutes after one o'clock the next day. The ball did not pass through. She saw prisoner that (Monday) morning; he came up to deceased's house and told deceased he wanted him to go squirrel hunting with him that morning; he stayed an hour or two, may be three. Deceased told him he could not go, that he didn't feel well able. Prisoner asked him three or four times to go squirrel hunting; he insisted on his going. Deceased said he would likely feel better in the evening, and if he did he would go with him. Prisoner said he would be back in the evening. Deceased was very sick; he set up a part of the time and was in bed a part of the time in the morning; he did not leave home that day; remained at home until after the children came home from school. The children who came home were Robert Warren Northcutt, Joseph A. Northcutt, (witness sworn in the case,) and Mrs. Strickland's children. Deceased went down to the plantation gate, as she supposes; he only staid a few minutes; when he came back he took up his little daughter and set down in the yard and went to singing; witness don't think it was more than thirty minutes after he commenced singing before Teal, the prisoner came. This was the same time that witness spoke of in the first part of her examination. All this took place in this county.

Cross Examined: Lives at the same place she did at the time Mr. Northcutt was killed, about five miles from Campbellton, and one or two hundred yards from where prisoner lived; prisoner was living on deceased's land; lived on the other side from Campbellton, of deceased's house; he usually passed their house coming to town. Prisoner and deceased appeared friendly on Monday morning; they talked friendly and parted friendly; deceased did not go to Emanuel Teal's mill on Monday. The first remark prisoner made when he came up in the evening was, "Bob come out here, I want to talk to you;" deceased replied, "Shack Teal I want you to go away from here."

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Joseph A. Northcutt says, that he saw prisoner in the cotton patch on Saturday before his (witness's) father was killed on Monday. The cotton patch belonged to his father and prisoner. That Warren Northcutt, William Strickland, William Latham and other little boys were with him; they were picking up apples and beating cider; he went down to a little apple tree, close to where prisoner was at work to pick up apples. Witness rode Mr. Latham's horse through the corn; prisoner said he would be damned if the horse should go back the same way; witness said if his pa was there he would go back and not ask him. Prisoner said he would make witness and pa, and all the rest of us suffer before Monday night; he spoke like he was not satisfied about it; and witness told him that they were going to start to school through there Monday morning; prisoner said he would be damned if they should. As witness came from school Monday evening, the gate was *withed* up. John Strickland, Warren Northcutt, and two little girls were along; witness and the others climbed the fence; his pa went down to the gate and cut it loose, and he and Warren went with him; after his father cut the gate loose he went back to the house, and he and Warren went back with him; his father sat down; did not see prisoner while they were gone. About a quarter of an hour after we got back saw prisoner coming up the road; it was about sun down. Prisoner had his father's gun when he came; he said when he first came up, "come out here Bob, I want to talk to you;" his father replied, "go off from here Shack Teal;" prisoner replied, "no, come out here any how;" his father started and went half way, and told him he was a grand rascal, and did'nt want to have any difficulty with him. Prisoner told him he was a damned liar; his father turned round and went back into the house, and got his gun and went to where prisoner was, and rattled his gun on the fence, and told prisoner to go off from there; "no," prisoner said, "come out here;" his father went out and prisoner walked off pretty fast some distance, and said

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"damn you, I am a great mind to shoot you, any how," and raised his gun and shot him. When his father went out he stopped and fastened the gate, and walked five or six steps in the direction that prisoner went; prisoner went thirty-eight or forty steps and stopped, and turned round and said damn you, I'll blow a ball through you, and shot at him. Witness was in the yard when the gun fired; his father held his gun down in his hand, and after the gun fired he raised his gun and snapped once or twice at prisoner; thinks he snapped two or three times; his father made no attempt to shoot before prisoner shot; prisoner would have had to go fifty or sixty yards up the road to get out of sight of witness. Prisoner went towards town.

Cross Examined: Prisoner was hoeing cotton when he went to the field on Saturday; he was not in the same field that witness went to; prisoner worked the corn; he rented the land from witness's father, the deceased; the horse bit a nubbin in going through the field, was the reason why prisoner did not want him to go back the same way. William Latham asked prisoner for a muzzle to put on the horse; prisoner lent him the muzzle, and he took the horse back the same way which he came. They had carried horses through the field frequently before. Witness has known his mother and others to ride through the field. He did not tell Emanuel Teal and Wiley Steed, three days after his father was killed, at Teal's mill, that he went into the house after the gun; and he did not tell Wiley Steed, three days after his father was killed, at the shop at Petersburg, that he, witness, went into the house after the gun. When his father went to the gate, witness saw his mother just entering the door to come out; just as his mother came out of the house the rifle fired, and she went straight on to Cook's; did not stop with the deceased. When the rifle fired Warren Northcutt was standing near deceased—much nearer than witness was.

Doctor Thomas C. Glover says, he went to see deceased on the night of the 30th July, 1855; he found a gun-shot wound

on the abdomen, $2\frac{1}{2}$ inches below the navel, and $2\frac{1}{2}$ inches from the middle-line, and cut out that ball near the spinal column. He was of opinion that the intestines were perforated, and that deceased must consequently die, and told him so. Deceased died the next day. Witness made a *post mortem* examination the following morning; found the small intestines perforated, mesentery blood vessels lacerated, and it is his opinion that the wound produced the death of the deceased. He met prisoner in town, after he was called to see deceased; asked him if he had shot deceased, prisoner said he had; asked him what he shot him with: he said with a rifle; asked him how many balls: he said only one; asked him how far he was from him: he said thirty or forty yards. Witness is a practicing physician.

Zadock Jennings, for the prisoner, sworn, says that he heard the conversation between Dr. Glover and prisoner; saw prisoner in town the night after he had shot Northcutt. Prisoner went to Samuel Lewis and offered himself up to Lewis, and told him that he had shot Northcutt, and expected he had killed him, and he had come to town to deliver himself up, and wanted him, the Sheriff, to go back to town with him.

Here the testimony closed, and after argument by counsel and the charge of the Court, the jury retired and returned a verdict of guilty. The jury was polled, and each acknowledged the verdict to be his, after which they dispersed.

The day after, defendant's counsel made a motion for a new trial, on the following grounds:

- 1st. Because the verdict was contrary to law.
- 2d. Because the verdict was contrary to the evidence, and circumstances attending it, and the weight of evidence.
- 3d. Because the special presentment on which the indictment was founded, was not entered on the minutes of the Court.

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4th. Because the special presentment was not introduced or read on the trial.

5th. Because the Court erred in permitting the special presentment to go before the jury, it never having been read as evidence.

6th. Because the Court did not read or explain to the jury the different grades of manslaughter.

7th. Because the Court erred in refusing to charge the jury as requested, as follows:

First: That when an indictment is made out on a presentment, it is incumbent on the State to prove the presentment.

Second: That it is incumbent on the State to prove that the presentment is made out according to the Constitution and laws.

Third: That on the trial of an indictment founded on a special presentment, it is necessary for the State to introduce the presentment as evidence, and on failure to do so, the case is not made out.

8th. Because the Court refused to charge, as requested, that if a man, though in no great danger of serious bodily harm; through fear, alarm, or cowardice, kill another, under the impression that great bodily injury is about to be inflicted upon him, it is neither manslaughter, nor murder, but self-defence.

9th. Because the Court erred in permitting the presentment to go before the jury, on the trial, without being tendered to defendant's counsel, and thereby depriving them of an opportunity to except to the variance in the name of a grand juror, in the presentment and bill—the name of Evan R. Whitley appearing in the bill, and that of Evan R. Whitley in the presentment.

10th. Because the defendant, since the trial, has discovered that he can prove by T. C. Glover that deceased struck at prisoner with the gun, before prisoner shot him.

11th. Because it appears that William M. McClung was:

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sworn as a juror, and that William W. McClung returned the verdict into Court—there being but one McClung.

The Court overruled the motion, and refused to grant a new trial, and counsel for prisoner excepta.

LIGON & WRIGHT, for plaintiff in error.

Sol. Gen. FIELDER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

We shall not undertake to notice each specification in the motion for a new trial, but group them together for the sake of brevity.

[1.] And to all the errors complained of, as it respects the special presentment, and the misnomer of the grand and traverse jurors, we make this general reply, that those irregularities which occurred before the arraignment, should have been specially pleaded: and secondly, that no motion in arrest of judgment shall be sustained, for any matter not affecting the real merits of the offence charged in the indictment. (*Cobb*, 833.) Under this provision of the Code, we held, that the failure to read the indictment to the jury was not good in arrest of judgment, (*Wright vs. The State*, 18; *Ga. Rep.*, 383.)

[2.] Error is assigned because the Court did not charge the jury as to involuntary manslaughter. Is there a particle of proof to authorize such a charge? In *Davis vs. The State*, 10, *Ga. Rep.*, 101, citing the previous case of *Holder vs. the State*, 3, *Ga. Rep.* 441, this Court did say, that “*in view of the facts disclosed by the record*,” the Court below ought to have given to the jury the definition of murder, voluntary manslaughter, and the two grades of involuntary manslaughter, and also the definition of justifiable homicide; and left it to them to find under which definition it fell; and not to

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have instructed the jury that they must find the defendant guilty of murder, voluntary manslaughter, or not guilty.

Could we say the same thing here—in view of the facts disclosed in this record? Have counsel in all their commendable zeal pointed out a scintilla of evidence which would reduce this killing to *involuntary* manslaughter? Did the prisoner in any of his confessions intimate any circumstance which should justify such a supposition? Did he say to the widowed wife, who, when she overtook him on the road, told him that he had killed her husband, that the shot was accidental, or that he did not intend to take his life, but to cripple him? Nothing of the kind.

It was then, as the Court stated, either murder, or voluntary manslaughter, or justifiable homicide. And so the jury were obliged to find. And such was the ruling of this Court in *Boyd vs. the State*, 17. *Ga. Rep.* 193.

Counsel insist, that inasmuch as any grade of homicide may be found under any indictment for murder, that it is the duty of the Court to charge on each, as each is necessarily put in issue by the pleadings. We demur to this proposition; and on the contrary, hold that the charge should apply to the case made by the pleadings and the *proof*. And that in just such a case as this, to charge the jury as to the crime of involuntary manslaughter, would have been as inapplicable to the case, as to have instructed them as to the law of arson or robbery.

[3.] Was the Court right in refusing to give the written charge requested by defendant's counsel? The request was that the fears of a coward would justify homicide. The Penal Code says, the fears of a reasonable man; reasonably courageous—reasonably self-possessed.

[4.] Was the verdict of guilty not only contrary to the evidence, but strongly and decidedly so? We think it was in accordance with the testimony, and the weight thereof. What other verdict could the jury have found upon the facts? There was no necessity for the killing. Teal himself, did

not pretend to Mrs. Northcutt, Dr. Glover and others, that there was—that he shot in self-defence; that he took the life of Northcutt to save his own. The proof shows that the very opposite of all this was true. That revenge had taken possession of the heart of this misguided man; and that to gratify it, he wantonly and wickedly murdered his neighbor in the presence of his family.

[5.] Ought a new trial to have been granted on 'account of the newly discovered evidence? Dr. Glover would swear that the deceased told him that he struck at Teal with his gun across the fence. But this was sometime before the consummation of the tragedy. Northcutt had not then gone outside of his inclosure. The accused had walked off some thirty or forty steps; and turning, said, "damn you, I am a great mind to shoot you, any how, or blow a ball through you." And the act accompanied the threat. Let it be remembered, too, that Dr. Glover states, that Northcutt said to him, at the same time, that at the time he was shot, he was offering no violence to Teal; neither had he attempted any, except that of striking at him across the fence, as already noticed.

We do not see that this proof could, by any possibility, change or modify the verdict of the jury. It ought not.

Upon any view of the case, we are constrained to affirm the judgment of the Circuit Court, overruling the motion for a new trial.

We sincerely pity this wretched man. But the law must be vindicated. Human life, the most sacred of God's gifts, must be protected.

Judgment affirmed.

Force, Brothers & Co. vs. Dahlonga Tanning and Leather Co.

No. 19.—FORCE, BROTHERS & Co., plaintiffs in error, vs. **THE DAHLONEGA TANNING AND LEATHER MANUFACTURING Co.,** defendant in *fi. fa.*, and **D. H. MASON,** affiant in illegality, defendant in error.

[1.] On the 4th of December 1841, the Legislature granted a charter to the Dahlonga Tanning and Leather Manufacturing Company, making the stockholders liable, as partners, for the debts of the corporation, and providing a summary remedy for the enforcement of the same. On the 10th day of the same month, they passed a general law, to facilitate the collection of debts against incorporations and the stockholders thereof.

Held, that the latter Act did not supersede or repeal the former; but was intended to apply to a different class of incorporations.

[2.] For a stockholder in a banking or other incorporation in this State, who is personally liable to discharge himself from liability for the notes or other contracts of such bank or other corporation upon a transfer of his stock, it is necessary under the Act of 1838, (Cobb 112,) that he should give notice once a month for six months, of such transfer, and immediately after the same is made in two newspapers in or nearest the place where such bank or other corporations shall keep their principal office; and even then, he is not exempt from the claim of a creditor who has given him written notice thereof within six months after the transfer is made.

[3.] Where a stockholder of a corporation is made individually liable upon an execution issuing against the corporation, he is entitled to the remedy by illegality, the same as any other defendant in *fi. fa.*

Illegality, from Lumpkin Superior Court. Decision by Judge TAPPÉ, at August Term, 1856.

Force, Brothers & Co., obtained a judgment against the Dahlonga Tanning and Leather Manufacturing Company, and issued their *fi. fa.* which they caused to be levied upon a negro belonging to David H. Mason, one of the stockholders in said company. Mason filed his affidavit of illegality, denying that he was a stockholder at the commencement of plaintiffs' suit against said company, and denying that the *fi. fa.* could be levied upon his property, plaintiffs not having proceeded to obtain judgment against said company, as provided by Act of 10th December, 1841.

The Dahlonga Tanning and Leather Manufacturing Co., was incorporated by Act of the Legislature 4th December,

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1841, which made the stockholders individually liable for the debts of the company, and authorized a *f. fa.*, issued upon a judgment against the company, to be levied upon the property of any stockholder.

The Court sustained the illegality and ordered the levy to be dismissed, and plaintiffs excepted.

MARTIN, for plaintiffs in error.

UNDERWOOD, for defendant in error,

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The main and controlling question in this case is, whether the plaintiffs should have pursued their remedy, under the charter of the Dahlonega Tanning and Leather Manufacturing Company, granted on the 4th day of December, 1841, or under the general Act passed by the Legislature at the same session, and only six days thereafter, to facilitate the collection of debts against incorporations, and the stockholders thereof.

The former is in these words :

“An Act to incorporate certain persons under the name and style of the Dahlonega Tanning and Leather Manufacturing Company.

Whereas, David H. Mason, John D. Field, junior, James J. Field, Benjamin F. Swanton and Zelotes H. Mason, of the town of Dahlonega and county of Lumpkin, have formed themselves into a company, by the name of the Dahlonega Tanning and Leather Manufacturing Company, for the purpose of tanning and manufacturing the leather into the various articles to which leather is applicable, and the dressing and manufacture of furs; and whereas, for the more conveniently carrying on the operations of said Company the said persons desire an act of incorporation:

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SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same,* That the said David H. Mason, John D. Field, junior, James J. Field, Benjamin F. Swanton, and Zelotes H. Mason, and such persons as may hereafter become subscribers and stockholders in said company, and their successors and assigns, shall be, and they are hereby created and constituted a body politic and corporate, by the name and style of the Dahlonega Tanning and Leather Manufacturing Company; and by that name shall be, and they are hereby made able and capable in law, to have, receive, purchase, possess, enjoy, and retain, to them and their successors and assigns, lands, rents, tenements, hereditaments, goods, chattles and effects, of whatsoever kind or nature, or quality, the same may be; and the same to sell, grant, demise, alien and dispose of; to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in any court of law or equity, or any other place whatever; to make and have a common seal, the same to break alter or amend at their pleasure; and also to ordain, establish and put in execution, such by-laws, rules and regulations, as shall be necessary and proper for the government of said corporation: *Provided*, they be not repugnant to the laws and Constitution of this State or the United States; and generally to do and perform all and singular such acts, matters and things as corporations may legally do and perform, for the purpose of carrying into effect the objects of the association: *Provided also*, the capital stock of said Company shall not exceed one hundred thousand dollars; and the privileges hereby conferred shall be held and enjoyed for the term of twenty years from the passage of this act, and no longer.

SEC. 2. *And be it further enacted by the authority aforesaid,* That the private property of the stockholders be bound for the payment of the debts of the Company.

SEC. 3. *And be it further enacted by the authority aforesaid,*

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said, That any *fieri facias* issued against said incorporation, may be levied and collected upon and out of the private property of any stockholder or stockholders in said incorporation.

SEC. 4. *And be it further enacted by the authority aforesaid*, That nothing in this corporation shall be so construed as to authorize said corporation to use and exercise Banking privileges."

The following is the latter act :

"An Act to facilitate the collection of Debts against Incorporations and the Stockholders thereof.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same.* That it shall and may be lawful for plaintiffs or complainants, within one month after the institution of any suit or suits at law or equity against any incorporation, joint stock or manufacturing company, to publish once a week for four successive weeks in some public gazette of this State, notice of the commencement of said suit or suits, and said publication shall operate as notice to each stockholder in said incorporation, joint stock or manufacturing company, for the purposes hereinafter mentioned.

SEC. 2. *And be it further enacted by the authority aforesaid*, That when notice has been given as aforesaid, and a judgment or decree has been obtained against any incorporation, joint stock or manufacturing company, where the individual or private property of the stockholders is bound for the payment of the whole or any part of the debts of said company, execution shall first issue against the goods and chattles, lands and tenements of said company; and upon the return thereof by the proper officer, with the entry "no corporate property to be found" endorsed thereon, that then and in that case it shall be the duty of the clerk or other officer, upon application of the plaintiff, his agent or attorney,

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accompanied with a certificate, as hereinafter directed to be obtained, forthwith to issue an execution against each of the said stockholders (if required) for their ratable part of the said debt and cost of suit, in proportion to their respective shares or other liabilities under their charter of incorporation.

SEC. 3. *And be it further enacted by the authority aforesaid,* That it shall be the duty of the president or presiding officer, by whatever name he may be designated, upon application of the plaintiff, his agent or attorney, forthwith to give a certificate, under oath, of the names of the stockholders in said company, and the number of shares owned by each at the time of the rendition of the judgment against said company.

SEC. 4. *And be it further enacted by the authority aforesaid,* That if upon application by the plaintiff, his agent or attorney, to the president or presiding officer as aforesaid, he shall refuse to give a certificate as aforesaid, or shall abscond or conceal himself to avoid giving the same, and oath being made by plaintiff, his agent or attorney of said refusal, the clerk or other officer is hereby required to issue execution against said president or presiding officer as aforesaid, for the amount of principal, interest and costs of said suit.

SEC. 5. *And be it further enacted by the authority aforesaid,* That if the president, directors or other officers of said company shall fail or refuse to defend said suit or suits, brought as aforesaid, any one or more of the stockholders of said company shall be permitted by the Court, before which said suit or suits is pending, to plead to and defend the same in as full and ample a manner as said company in its corporate character could plead to and defend the same.

SEC. 6. *And be it further enacted by the authority aforesaid,* That the defendant or defendants in execution, under the provisions of this act, shall be entitled to an illegality, under the same rules, regulations and restrictions as defen-

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dants are in other cases, under the existing laws of this State.

SEC. 7. *And be it further enacted by the authority aforesaid, That this statute shall be understood and construed as cumulative of the common law; and that all laws and parts of laws militating against the same, and this construction thereof, be, and the same are hereby repealed."*

Did the Assembly intend by this last Act, to supersede or repeal so much of the charter of the Tanning and Leather Manufacturing Company as militated against its provisions?

It is unreasonable to suppose that the same body of men, should at the same session and within six days, either directly or by implication, do such a thing. By the charter, the stockholders are made liable as partners; and upon a judgment rendered against the corporation only. By the general law, *a pro rata* liability only is created; and a very different mode is prescribed for enforcing it.

Our conclusion is, that the last act is applicable only, perhaps, and was so intended, to those incorporations which made their members individually bound, though ratably only, for the corporation debts, and which do not contain, within themselves, a summary remedy for enforcing this personal liability, and that this general statute does not repeal the special act passed at the same session, upon the same subject.

[2.] Is the defendant a stockholder, and, as such, liable in his natural and private capacity, under the charter, for the creditor's debt? An issue was tendered by the plaintiff and refused by the Court, to establish the fact that he was not only one of the original stockholders, but continued to be such up to the time when the debt was contracted, and suit instituted.

That Mr. Mason was one of the original stockholders, is not denied. The act of incorporation recites the fact that the charter was granted to him and others therein named. He

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made no attempt to show that he had ever transferred his stock in terms of the act of 1838, to regulate the settlements between the banking institutions of this State, and to define the liability of stockholders who shall transfer their interest therein, or other institutions.

The 2d section of that act declares that, "where the stockholders in any bank or other corporation are individually responsible under the charters thereof, and any such stockholder shall transfer his or her stock, he or she shall be exempt from all liability for the notes and contracts of such bank or other corporation, unless he or she receive written notice from any creditor thereof within six months after such transfer (in which case he or she shall not be exempt from such creditor's claim.) Provided, such stockholder shall give notice once a month for six months, of such transfer immediately thereafter, in two newspapers in or nearest to the place where such bank or other corporation shall keep the principal office," *Cobb* 112.

Under this act it would seem, the defendant is liable as a stockholder, unless he alleges and proves that he has discharged himself according to the provisions of this statute.

[3.] As to the other point made in the bill of exceptions, as to illegality being the proper remedy, we hold that as the execution against the corporation is made to operate against the stockholder, that he is so far a party to it as to be entitled to this remedy.

Judgment reversed.

No. 20.—WILLIAM G. FIELD, plaintiff in error, vs. WILLIS PUTMAN, defendant in error.

[1.] By the 54th section of the Judiciary Act of 1799, it is required, that where either party in any cause, in the Inferior Court, shall except to any proceedings affecting the merits, the party complaining shall present such exceptions in writing, signed by himself or his attorney; and if the same shall be overruled by the Court, he may apply for a certiorari, &c.

Held, That while it is true that the Act contemplates the exceptions to be overruled by the Court, in term time, and not by the individual members, some month or more after the adjournment; still if the certiorari be granted and a return made thereto by the proper officer, it is evidence upon which the Judge of the Superior Court may act, especially if the petition for certiorari be sworn to by the attorney of the party.

[2.] A certiorari will lie from the decision of the Inferior Court sitting as a *habeas corpus* Court.

[3.] The 2d section of the Act of 1845, provides that "when any debtor is surrendered by his security, it shall not be lawful for any Court to discharge such debtor from custody, because the jail fees are not paid or secured, unless the Sheriff or jailer shall give at least ten days prior notice in writing to the plaintiff or his attorney, who shall be allowed that time within which to pay or give security for the jail fees."

Held, That notice in such case is indispensable; and in the opinion of a majority of the Court, Judge McDonald *adbitante*, a judgment of discharge without it, is void, and may be treated as such in any Court; and the Court are unanimously of the opinion that it does not protect the debtor thus discharged from a re-arrest. Is any one but the jailer or Sheriff, entitled to the benefit of this proceeding? *quere*.

[4.] The pay allowed the jailer for keeping a prisoner, is 40½ cents per day.

Certiorari, in Forsyth Superior Court. Decision by Judge TRIPPE, at September Term, 1856.

William G. Field, the plaintiff in error, had been arrested by *capias ad satisfaciendum*, issued against him at the suit of Willis Putman; he gave bond and security for his appearance, to take the benefit of the honest debtors' act of 1823. At the term of the Court to which he was required to appear, not availing himself of the provisions of said act, he was surrendered by his sureties, and the Court made an order that he be imprisoned in the common jail of Forsyth county, until he make a disclosure of his property and

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effects, and give the notice required by law. Under this order, Field was confined in jail for about nineteen months; the plaintiff in *ca. sa.* paying during that time the jail fees required by the jailer. On the 15th day of May, 1854, Field applied for a *habeas corpus*, returnable before the Justices of the Inferior Court, claiming to be discharged from his imprisonment, on the ground that plaintiff in *ca. sa.* had given no bond for jailer's fees, and more than one week's jail fees for dieting prisoner was due and unpaid.

Upon hearing the application, the Inferior Court discharged the prisoner, on the ground that the jail fees had not been paid weekly, as required by statute in such case provided:

To this decision of the Inferior Court, discharging Field, Putman excepted, and brought the same for review and reversal, by certiorari, before the Superior Court. The Justices of the Inferior Court filed their answer setting forth the foregoing facts, and after argument, the Court sustained the certiorari, and ordered the judgment of the Justices to be set aside, on the ground, that no notice of the application for *habeas corpus*, on the trial, either verbal or otherwise, had been given to the plaintiff Putman or his attorney. And defendant Field by his counsel excepted to this decision, and tenders his bill of exceptions.

BROWN, by WALKER, for plaintiff in error.

IRWIN, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

The first question to be considered in this case is, ought the certiorari to have been dismissed?

[1.] It is insisted that it should have been, because not taken out in conformity with the 54th section of the Judiciary Act of 1799. That section provides that, "when either party in any cause shall take exceptions to any proceedings in any

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cases affecting the real merits of such cause, the party making the same shall offer such exceptions in writing, which shall be signed by himself or his attorney; and if the same shall be overruled by the Court, it shall and may be lawful for such party, on giving twenty days' notice to the opposite party or his attorney, to apply to one of the Judges of the Superior Court, and if such Judge shall deem the said exceptions to be sufficient, he shall forthwith issue a writ of certiorari, directed to the Clerk of such Inferior Court, requiring him to certify and send up to the next Superior Court, to be held in the said county, all the proceedings in the said cause; and at the term of the Superior Court to which said proceedings shall be certified, the said Superior Court shall determine thereon, and order the proceedings to be dismissed, or return the same to the said Inferior Court, with order to proceed in the said cause." Cobb 523.

It is certainly true, that the mode of suing out this certiorari, was not a strict or even a substantial compliance with the statute. The exceptions in writing have to be signed by *the party and overruled by the Court*, and not by the individual members, some thirty days or more after the adjournment of the Court; still, irregular as the proceedings may have been, it was worth something to the Judge of the Superior Court, in certifying to him as to what did transpire in the cause; especially as the return was made by the proper officer, admitting the truth of the facts contained in the exceptions. The Courts should look to the substance of things. Suppose a bill was filed praying an injunction, which the complainant had omitted to verify, the defendant however, overlooking the defect, puts in his answer, confessing the facts upon which the equity of the bill rests, would the injunction be dissolved? But a sufficient, and perhaps a more satisfactory answer to the objection is, that the petition for certiorari was sworn to by Mr. George N. Lester, the attorney of Putman. A party in the Inferior Court is not obliged to proceed under the Judiciary Act of 1789. He is

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entitled under the Act of 1811, (*Cobb* 528,) to bring his certiorari upon affidavit as in Justices' Courts. Why not? And at any time within six months after the case has been determined in the Court below. (*Cobb* 528.) And in this view of it, there is no difficulty in the case.

[2.] The question has been raised, whether a certiorari will lie from the decision of the Inferior Court, sitting as a *habeas corpus* Court? We have no doubt upon that subject. The Justices of the Inferior Court are a permanent body of magistracy; and when sitting as a *habeas corpus* Court, a jurisdiction conferred upon them by law, they are a Court of record, and have a Clerk. Such was not the case of *Heard vs. Heard*, 17 *Ga. Rep.* 739.

[3.] Then comes up the question of notice. We hold it was indispensable in this case. This debtor was committed to jail upon a surrender by his security. The case consequently falls under the Act of 1845, and not the Act of 1847. The second section of the Act of 1845, enacts that, "when any debtor, after giving bail or security, on *mesne* or final process, shall be surrendered by his bail or security, and committed by the Sheriff to jail; it shall not be lawful for any Court to discharge such debtor from custody, because of the jail fees not being paid or secured, unless the Sheriff or jailer shall give at least ten days prior notice in writing, to the plaintiff or his attorney, who shall be allowed that time within which to pay or give security for the jail fees, and thereby prevent such discharge." *Cobb* 391.

It is conceded the notice was not given. It could not be dispensed with. It was to enable the creditor, if in default, to pay the fees, and thus comply with the law. And when the statute says, that it shall not be lawful for the Court to discharge the debtor, unless this notice is given, I hold, as do, a majority of this Court, that the judgment is void, if rendered in defiance of this act. It is a nullity, and may be so treated every where and by any body, and the debtor may be re-arrested, notwithstanding such discharge. Moreover,

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I am strongly inclined to the opinion, that the application in such cases, should proceed from the Sheriff or Jailer, and not at the instance of the debtor. The act was passed for the protection of the county and its officers, and not for the benefit of the debtor.

Nor did the casual appearance of Mr. Richard Lester, who was not the attorney of Putman, dispense with the necessity of the notice.

[4.] As the question is fairly presented, we deem it best to settle what are the fees due the jailer.

Under the original fee bill, he was entitled to $37\frac{1}{2}$ cents for the board of a prisoner. (*Prince 200.*) There were two acts passed in 1818, each adding 50 per cent. to the original fees allowed the jailer; one the 8th and the other the 19th of December, of that year. (*Lamar's Dig. 164, 322.*) On the 16th of December, 1819, an act was passed increasing the fees of county officers (jailers included,) 25 per cent. on the rate established previous to the 1st of December, 1818; and repealing all laws and parts of laws, militating against the act. (*Lamar 322.*) And the uniform decision for forty years, (saving one,) upon these statutes, has been that the Acts of 1818, were superseded by the Act of 1819; and that 25 per cent. only was to be added to the original fee-bill. The 25 per cent. *must* be added, for it is the last act upon the subject. And if you super add to this the 50 per cent. allowed the jailer alone, under one of the Acts of 1818, and his fees will be upwards of 65 cents per day, instead of $56\frac{1}{2}$, claimed in this case; and add the other 50 given to the jailer in common with the other county officers, under the other Act of 1818, and it will make his fees upwards of 89 cents. We are satisfied that the jailer in common with the other county officers, is entitled to the original fee of $37\frac{1}{2}$ with 25 per cent. added, making his pay $46\frac{1}{2}$, and not $56\frac{1}{2}$. Indeed there is no view of these several acts, which would justify this last sum.

Judgment affirmed.

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No. 21.—THOMAS W. BROCK, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] The presentment of a party by a Grand Jury, is an accusation, is an indictment, a prosecution, and when the Grand Jury makes a presentment, it arrests the statute of limitations.
- [2.] To justify a Court to give a charge to the jury requested by counsel, the pleadings and evidence must authorize it.
- [3.] To enforce the payment of a fine, the Court may imprison the defendant, and it is not error to express in the sentence, a limit beyond which the imprisonment shall not extend, if the fine is not paid.

Indictment for Gaming, from Forsyth Superior Court. Tried before Judge Brown, at February Term, 1867.

The defendant in the Court below, *Thomas W. Brock*, was specially presented by the Grand Jury of Forsyth county, at August Term, 1866, for the offence of playing and betting at cards. It was agreed between defendant's counsel and the Solicitor General, that the former would waive the making out and filing the indictment upon the special presentment, if the latter would consider the indictment found and filed as of that day, the 19th February, 1867, and allow the defendant the benefit of the plea of the statute of limitations: and the following entry was endorsed on the presentment: "We waive an arraignment, and consent to consider the bill of indictment as filed of to-day, 19th February Term, 1867, (signed) by G. W. Lester and W. J. Peoples, defendant's attorney."

Before going into the trial, defendant's counsel demurred to the indictment and moved the Court to take a verdict of not guilty, upon the ground that the indictment showed upon its face that the same was not found and filed within two years after the commission of the offense charged therein, and that the same was barred by the statute of limitations. The Court overruled the demurrer and motion, and defendant excepted.

After the testimony was closed, defendant's counsel requested the Court to charge the jury that if the indictment upon its face showed, and they believed from the evidence, that the offence was committed two years before the finding of the indictment, that the same was barred by the statute of limitations, and that the defendant ought to be acquitted: which charge the Court refused to give, but charged the jury, that if the special presentment was found within two years from the commission of the offence, that the defendant was not protected by the statute of limitations, although the indictment was not made out until after the lapse of two years from the time of the commission of the offence, and if they were satisfied from the evidence that the defendant had committed the offence at any time within two years prior to the finding of the special presentment, that the statute was no bar, and they should find defendant guilty. To which charge and refusal to charge, defendant excepted. The jury found the defendant guilty; and the Court sentenced him to pay a fine of \$100, and cost of suit; and on failure to pay the same, to three months imprisonment, unless said fine and costs were sooner paid. To which judgment and sentence, defendant excepted.

And thereupon counsel for defendant tendered their bill of exceptions, and assign as error the rulings, judgment, charges, and refusals to charge above excepted to.

IRWIN & LESTER; and W. J. PEEPLES, for plaintiff in error.

SOL. GENERAL, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The defendant was presented at the August Term of 1856, of the Superior Court of Forsyth county. The offence was charged to have been committed on the 14th day of November, 1854. The Solicitor General and the defendant's



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counsel entered into an agreement before the trial, in the following words: "We waive an arraignment, and consent to consider the bill of indictment as filed as of to-day, 19th of February Term, 1857."

[1.] The defendant's counsel demurred to the bill of indictment on the ground that it showed on its face, that it was not found and filed in the proper Court within two years from the commission of the offence, as charged therein, and that the offence was barred by the statute of limitations. The Court overruled the demurrer. The counsel for the prisoner excepted. The indictment shows that it was found by the Grand Jury at August Term, 1856, and that the offence was committed in November, 1854. Two years had not intervened between the commission of the offence and the finding of the bill of indictment. The presentment is the indictment. If the offence is charged by the Grand Jury in the presentment, the indictment is then found, for the duty of that, and all other Grand Juries, is at an end on that accusation, unless it be quashed or a *noli prosequi* be entered. The charge is complete, and it is sufficient, so far as the grand inquest is concerned, to put the accused on his trial before the Jury.

[2.] The charge of the Court to the jury is sustained by the testimony. The indictment charges the offence to have been committed within two years before the presentment or indictment, and the proof supports it. It would have been error to have charged as requested.

[3.] The ground of error assigned on the judgment of the Court, is that the Court sentenced the defendant to be imprisoned for three months in the common jail. On examining the record, we find that the judgment of the Court does not sustain the assignment. The judgment is that the defendant pay a fine of one hundred dollars and the costs of the prosecution, and on failure to pay the same, that he be committed to the common jail of the county for three months, unless the fine and costs be sooner paid.

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The penalty for the offence of which the defendant was convicted is pecuniary altogether. The Court, on imposing the penalty, may enforce its payment by adjudging that the party convicted be committed until the fine and costs are paid. The imprisonment is no part of the penalty imposed, but it is the means and the legal means of enforcing the judgment of the Court. Such is the judgment in this case. The imprisonment is not ordered as a penalty, and the judgment is not in the alternative, and the imprisonment, when suffered, is not a discharge of the penalty. That still remains. The judgment, as pronounced, is milder and more favorable to the prisoner than the ordinary judgment—to stand committed until the fine is paid—for under this sentence, if he pays the fine and costs before the expiration of three months, he is to be discharged, and whether he pays or not, at the expiration of three months he is to be discharged.

Judgment affirmed.

No. 22.—JOSEPH DAVIS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

An indictment against a person for playing and betting at cards, ought to state enough to show whether the person with whom the playing and betting was done, was a white person or a negro.

Indictment for playing and betting at cards, from Cherokee Superior Court. Tried before Judge BROWN, at February Term, 1857.

The testimony having closed, defendant's counsel demurred to the indictment, and moved for a verdict of acquittal of the defendant, on the ground that said indictment in one and

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the only count in the same, charged nine different and distinct offences, to-wit: playing and betting for money and other things of value at a game of faro, loo, bragg, bluff, three up, seven up, poker, vington, eucher, and other games played at cards; and on the further ground, that said indictment did not charge or allege how, in what manner, or *with whom* the defendant did play and bet:—the defendant being the only person indicted, and it being no where charged or alleged that defendant played and bet with any person, and that he could not commit the offence by himself.

The Court overruled the demurrer, and refused the motion; and defendant's counsel excepted.

The jury found the defendant guilty. Defendant moved to set aside the verdict and for a new trial, upon the ground above taken, which motion the Court overruled, and refused, and thereupon defendant tenders his bill of exceptions.

WORD; IRWIN & LESTER, for plaintiff in error.

SOL. GENERAL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The first ground of the demurrer was abandoned in deference to the decision in *Wingard and Ham vs. the State*, in 13 *Geo. Rep.*, 396. See also, a similar case, decided at *Macon, January Term, 1857*.

The indictment did not state who it was with whom the accused played and bet. This was the second ground of the demurrer, and this, we think, was a good ground. There is a statute which prohibits playing and betting at cards with negroes, as well as a statute which prohibits playing and betting at cards with white persons, and the punishment under the former statute may be much more severe than it can be under the latter. *Cobb Dig.* 820, 837. Which of these statutes was it that the indictment intended to say had been violated? It is impossible to tell. The charge will fit either.

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er, and therefore, a verdict of guilty would sustain a sentence founded on either.

We think, that an indictment that is so uncertain, as to expose the accused to such a danger as this, is too uncertain to be good. And consequently, we hold that the Court below erred in not sustaining the demurrer.

Judgment reversed.

No. 23.—JEFFREY SANDERS, plaintiff in error, vs. THOMAS N. WHITE, defendant in error.

New trial granted in Justice Court, because verdict of the Jury was not sustained by the evidence.

Certiorari, in Cherokee Superior Court. Decision by Judge TRIPPE, at October adjourned Term, 1856.

Thomas N. White sued Jeffrey Sanders and Joseph Thompson in a Justice's Court on an account for twenty-two dollars and eighty cents, "for cash paid to Clerk and Sheriff, and for balance of debt to Thomas N. White, due by said defendant." At the appearance Term, Sanders pleaded the general issue: At the trial Term, judgment was given for the plaintiff, for the amount sued for. Sanders appealed but failed to pay the cost and give security within four days, as required by law. At the May Term of the Justice's Court, both parties being present, White proposed to Sanders that he would give him a jury trial, "if he would comply with the law, and be satisfied with a jury trial, and that both parties should stand to the verdict of the jury," which Sanders agreed to do. At the June Term the case was tried. White proved by a witness; that he, witness, was at Canton with his wagon and San-

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ders asked him to wait on him, that there was a man in Jail that he wanted to get out as soon as he could see White. Witness told him to be in a hurry, and when Sanders returned, Joseph Thompson and White were with him, and all rode in his wagon, and he heard Sanders tell White that if Prather did not sign the note, that he was in for it. This seemed to be the promise to pay the account upon which plaintiff relied.

Samuel Weil, defendant's attorney, raised a point upon the statute of frauds, and wished to read the law upon that subject, which the Justices would not permit him to do. The case was submitted to the jury, who found for White \$22 80; and Sanders excepted on the ground, that his attorney was not allowed to read the 4th section of the statute of frauds, and because there was no evidence to sustain the verdict of the jury, and that if there was any evidence, it showed a verbal promise to pay the debt of another; and by certiorari brought the case for review before the Superior Court, and the presiding Judge of that Court ordered the certiorari to be dismissed, and Sanders by his counsel excepted.

WEIL, for plaintiff in error.

WHITE, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

This Court can take no notice of the bargain between the parties, shown in the record, that if the plaintiff would allow the defendant a jury trial, he would abide the verdict, whatever it might be. The defendant's refusal to comply with his contract is no ground upon which we can refuse to determine on the case, as it properly comes up.

We have carefully examined the record, and find no evidence to sustain the verdict of the Jury. The account sued on is for costs paid Clerk and Sheriff and balance of debt

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due plaintiff, White. The proof is, that defendant Sanders asked witness who was leaving town with his wagon, to wait on him, that there was a man in jail that he wanted to get out as soon as he could see White. This is certainly evidence to be submitted to the jury, and was proper and relevant to prove that Sanders wanted to employ White to get some person discharged from jail. When Sanders returned, White and Joseph Thompson were with him. There is no evidence that Thompson or any one else was in jail, or that White rendered professional services in having him discharged, nor is there the slightest proof of the value of the services. The witness states further, that he heard Sanders tell White that if Prater did not sign the note, that he Sanders was in for it. Neither the amount of the note nor the consideration for which it was to be given, nor to whom it was payable, was in proof.

We think that the Court below ought to have granted a new trial, on the ground that the verdict of the jury was contrary to evidence, and we reverse his judgment.

Judgment reversed.

No. 24.—THOMAS MILSAPS, plaintiff in error, vs. JOSEPH JOHNSON, defendant in error.

A *qui tam* action does not lie in this State to recover the penalty given by the 32 Henry 8th, for the sale of pretended titles to land.

Debt *qui tam*, from Fannin Superior Court. Decision by Judge TRIPPE, at November Term, 1856.

The plaintiff, Thomas Milsaps, brought an action of debt, *qui tam*, against Joseph Johnson, junior, to recover the pen-

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alty. prescribed by statute 32. Henry 8, Sec. 2, for bargaining for, and buying a pretended title to a lot of land, of which plaintiff was seized and possessed. The amount sued for was two thousand dollars, the alleged value of the land.

The defendant demurred to the declaration, on the ground that the said statute of Henry 8th, was not of force in Georgia, and that an action for buying a pretended title would not lie in this State.

The Court sustained the demurrer, and dismissed plaintiff's action, and to this decision counsel for plaintiff excepts, &c.

WM. MARTIN, for plaintiff in error.

UNDERWOOD, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Is a party in this State entitled to a *qui tam* action, to recover the penalty prescribed by the 32. Henry 8th, for the sale of a pretended, or as it is sometimes called, a pretense title to land?

It is exceedingly questionable whether any portion of this act ought ever to have been adopted by our Courts, for the simple reason, that the policy in which this statute originated, does not and never did exist here. When this Court was organized, it found that it was enforced pretty generally by the Circuit Courts in this State, in a very limited form; and in this, as in other cases, we acquiesced in the decisions as we found them; and hence recognized the doctrine in *Pitts against Bullard*, (8. Ga. Rep. 5,) and subsequent cases. But so far as we know, it has never been supposed, that the right to sue for the penalty given by this statute, had been adopted here. Neither the books of reports, beginning with the elder Charlton, nor tradition itself, furnish any such case. Indeed, our Courts have never even held, that twelve months previous possession, was necessary as required by the Eng.

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lish statute, in order to sell. The object of the law was understood here as being to prevent the sale of law suits, it was sufficient, if there was no adverse possession held by another at the making of the deed. (*See 3. Ga. Rep. 17.*)

We have a right to infer therefore, that the penal portion of this statute, was not usually of force in this State previous to our adopting statute. For if otherwise, why practically disused since the memory of the Bar? In none of the arguments submitted to this Court upon the 92. Henry 8th, has it been assumed or supposed, that the penal part of the act was of force. On the contrary, it has been uniformly repudiated. The same seems to be true in other States of the Union, a great majority of whom, have adopted this statute in the modified form it has been here.

It is common, as in the 43d of Elizabeth, respecting charitable uses, to adopt a portion of a British statute so far as deemed applicable to the wants and condition of our country, and disregard or reject the balance.

Judgment affirmed.

NO. 25.—JOHN W. BEAVER, plaintiff in error, vs. ISAAC MORRISON, defendant in error.

The drawer of a lot of land died. After his death a grant for the lot was issued in his name. After the issuing of the grant, letters of administration were taken out on his estate.

Held, that by the letters, the legal title to the lot vested in the administrator, so that he might maintain ejectment for the lot.

Ejectment, from Fannin Superior Court. Tried before Judge TRIPPE, at November Term, 1856.

This was an action of ejectment, brought by John Doe; *ex dem.*, Isaac Morrison administrator of William Bates,

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deceased, against Richard Roe, casual ejector, and John W. Beaver, tenant in possession, for the recovery of a lot of land situated in the county of Fannin.

On the trial, plaintiff proved that William Bates, lessor's intestate, died prior to the year 1840. That the grant from the State of Georgia to the said Bates, who was the drawer of the lot, was issued and bore date in the year 1843. The letters of administration to Morrison, and the order of the Court of Ordinary, appointing him administrator of said Bates, were dated in 1854.

The Court charged the jury that the grant in 1843, vested the title to the land in Morrison the administrator, and that he could recover on that title. To which charge defendant's counsel excepted, and now assigns the same as error.

UNDERWOOD, for plaintiff in error.

WM. MARTIN, represented by B. Y. MARTIN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the charge right? we think that it was.

In 1813, the Legislature passed an Act, containing a section in these words: "That all grants which have or may be issued by the Governor of this State, to persons who have been or may be dead before the issuing or signing of the same, shall be deemed, held and considered, as valid and legal in law, as if the said grantee or grantees had been alive at the time of the issuing and signing of said grant or grants, and as such submitted to the jury; any law, usage, or custom to the contrary notwithstanding."

These words apply not more to grants that had been issued before the passage of the Act, than to the grants that might be issued after the passage of the Act.

They therefore, made the grant, in the present case, as val-

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id and legal, as it would have been, if the grantee had still been alive at the time when it was issued.

And the grant being valid, it must have had the effect to convey the land to which it referred, to the heirs of the grantee; for, as there was no administrator or executor of the estate of the grantee, there were no persons besides the heirs, to whom the land could be conveyed. The effect of the grant, then, was to vest those heirs with the title to the land, and thus to place the land along side of that property to which the grantee had a complete title at the time of his death, and to make the land assume the precise state of that property.

Now, the effect of the grant of letters of administration on the estate of the grantee, was to vest the legal title to *that property* in the administrator. This must be indisputable. But if the effect was to vest the legal title to that property in such administrator, it must also have been to vest the legal title to the land in him, for the land stood in the precise condition of that property.

We think therefore, that the charge was right.

I remark, in answer to an observation of the counsel for the plaintiff, that in every case, in which lapse of time *ought to be* a bar to a suit by an administrator, it will be held to be a bar by a Court of Equity. See *Jonekin vs. Holland*, 7 *Geo. Rep.*, *Drummond vs. Hardaway*, 21 *Geo. Rep.*, 433.

Judgment affirmed.

No. 26.—WILLIAM E. PIERCY, and others, plaintiffs in error,
vs. DAVID ADAMS and wife, defendants in error.

Bill to enforce contract concerning an interest in lands, not demurrable, because it does not state whether the contract was or was not in writing.

Pierce et al. vs. Adams and wife.

In Equity, from Fannin Superior Court. Decision on demurrer, by Judge TRIPPE, at November Term 1856.

This was a bill filed by William E. Piercy and others, children of William W. Piercy, deceased, against David Adams and Chlorinda, his wife, who was the widow of Adolphus Piercy, a deceased brother of complainants.

The allegations of the bill, in substance are, that in the year 1851, William W. Piercy, father of complainants and said Adolphus, then in life, negotiated an exchange of lands, which he owned in the county of Murray, for two lots in the county of Fannin, belonging to Lazarus Patett and John W. Patett, and received upon the exchange, the sum of five hundred dollars. That the lands in Fannin were estimated at nine hundred dollars, and that was about all the estate owned by the said William; that although the land given in exchange belonged to their father, the said William W. who had paid for the same, the deeds from the Patetts for the lands received by him, were made to Adolphus Piercy, their brother, with the understanding and agreement that the same should be used, occupied and cultivated by the said William Piercy and all his children during his life, and at his death, to be continued to be used and enjoyed jointly by all, or to be equally divided between them share and share alike; that in pursuance of said understanding and agreement said William W. and all his children, went into possession of said lands and occupied and cultivated the same; that Adolphus Piercy died in the year 1852, and the family continued in possession of said lands until the death of their father, the said William, in September 1853, and after his death until the spring of 1854, when the said Chlorinda, the widow of Adolphus intermarried with David Adams; and that the said Adams, in utter disregard of the agreement and understanding of all parties, has commenced his action of ejectment for the recovery of said lands, and threatens to dispossess complainants and to deprive them of their home.

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The bill prays that the ejectment cause be enjoined, and that Adams and wife be decreed to execute and deliver to complainants, deeds for their respective shares or proportions of said land, and that the agreement aforesaid be carried out, and performed.

To this bill defendants demurred and answered.

The Court dismissed the bill upon the demurrer, and complainants excepted to this decision and tender their bill of exceptions.

UNDERWOOD, for plaintiffs in error.

FRANCES, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

This is a bill to enforce a contract respecting an interest in lands.

The bill sets forth a contract, but does not disclose whether that contract was in writing or not. The sole ground of demurrer is, that the bill does not show that the contract was in writing.

The bill need not state whether the contract was in writing or not. The allegations of the bill, when it comes to be heard, must be supported by competent proof. The contract is matter of proof. The judgment of the Court, therefore, sustaining the demurrer must be reversed.

Judgment reversed.

Witzel vs. Pierce adm'r &c.

No. 27.—JOHN C. WITZEL, plaintiff in error, vs. WILEY PIERCE, adm'r &c., defendant in error.

[1.] In an action of ejectment by an administrator, he offered in evidence, his letters of administration certified thus: "Given under my hand and seal, in office, this August the 7th, 1854.

JOSEPH GAR, Ordinary, D. C." [Decatur County.]

Held, that under the Act of 1852, organizing the Court of Ordinary anew, this was a sufficient certificate.

[2.] A deed made by the drawer before the grant issues, is not void, but is good to convey all the right which the drawer has.

Ejectment, from Fannin Superior Court. Tried before Judge TRIPPE, at November Term, 1856.

This was an action of ejectment brought by John Doe, ex dem. of Conrod Augley, and Wiley Pearce adm'r of Conrod Augley, against Richard Roe, casual ejector, and John C. Witzel, tenant in possession, for the recovery of lot of land No. 123, in the 9th district, 2d section, of originally Cherokee, now Fannin county.

Plaintiff first introduced a copy grant from the State to Conrod Augley, issued 1st day of July 1843; then the letters of administration from the Court of Ordinary of Decatur county, dated the 7th of August, 1854, on the estate of said Augley, granted to Wiley Pearce; proved defendant's possession, and the annual value of the premises, and closed.

Defendant objected to the introduction of the letters of administration, as evidence:

1st. Because they were not properly certified.

2d. Because the intestate Augley is not identified therein as being the same as the lessor of plaintiff in the first demise.

3d. Because there was no proof of the death of the plaintiff's lessor, in first demise.

The objections were overruled by the Court, and defendant excepted.

Defendant then introduced the *original grant* from the State to Conrod Augley, a *copy* of which was given in evi-

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dence by the plaintiff, dated 1st of July 1843. He then introduced a deed from Augley to Hiram Atkinson, for said lot, dated 7th October, 1833. Also a deed from Jonathan Cox, Sheriff, to John Crumby, dated 7th December, 1843, citing that the land had been sold under a *fi. fa.* against Atkinson; and a deed from Crumby to defendant, dated 25th December, 1843. He proved possession in himself for more than ten years, claiming and cultivating the same.

The presiding judge charged the jury that the deed from Augley executed prior to the issuing of the grant by the State, and before the passage of the Act of 1833, conveyed no title, and further charged, that the statute of limitations did not begin to run against plaintiff until the appointment of an administrator. To which charge defendant excepted.

The jury found for the plaintiff the land in dispute, and one hundred dollars mesne profit.

Whereupon defendant tenders his bill of exceptions and assigns as error the rulings and charges of the Court above excepted to.

FRANCES, for plaintiff in error.

UNDERWOOD, representing MARTIN & BROWN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the Court below right in admitting the letters of administration? We think that the Court was.

There was a demise in the name of the administrator appointed by the letters. The letters therefore, were pertinent to the issue on that demise.

The letters were certified thus: "Given under my hand, and seal of office, this, August, the 7th, 1854.

JOSEPH GAR, Ordinary, D. C." [Decatur County.]

[1.] We think that this was a sufficient certificate, under

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the Act of 1852, "to carry into effect the amended constitution, in reference to the Ordinaries." *Acts of 1852*, 91.

Since that act, the Court of Ordinary has been its own clerk.

The deed from Augley was made before the grant had been issued to him, and before the act of 1833, "to prescribe the mode of selling land at Sheriff's sale, in the counties of Lumpkin" &c, had been passed. These things being so, the Court below charged the jury that the deed conveyed no title, that is, as we understand the charge, conveyed no right.

Was this charge proper?

We think not.

A draw in any of the land lotteries, gives the drawer a right to the land on payment of the grant fees. This no body disputes.

Such a right is *assignable*.

It must be as much assignable as is the right of the holder of a bond for titles, conditioned for titles to be made to him on the payment of the purchase money, for it is a right that does not differ from that right, in any essential particular, and that right is assignable.

This Court has held, that a *chance* for a draw is assignable, *Dugas vs. Lawrence*, 19 *Ga. Rep.*, 557.

Much more must the draw itself be assignable.

It is true, that the act aforesaid, of 1833, in its fourth section, says that sales of land in certain counties, (in one of which this land lies,) made before the grant shall have been issued, shall be "void." *Cobb Dig.* 699.

But this act is evidence to show that the *Legislature* thought, that without the act such sales would be good. If they did not, why did they pass the act? And the sale of the land in question, in this case was made *before* the passage of the act.

Again in 1841, the Legislature amending this act, declared that all sales which might be thereafter made by *Sheriff's* or *Coroners* before the grant had issued, should be void; but

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that all deeds which might be thereafter made, or which had been made since the act of 1833, *other* than those made by Sheriffs or Coroners, should be valid.

Now, among "deeds, other than those made by Sheriffs or Coroners," is it likely that the Legislature intended to make a discrimination; founded merely on the relation which their dates bore to the date of the act of 1833,—a discrimination to the effect, that those which were older than that act, should be void, but that those which were younger, should be valid? It is most unlikely. But if the Legislature intended that there should be no such discrimination, it must have intended that all should be valid, for it expressly said that some should be valid.

Doubtless the Legislature thought that this object would be accomplished by leaving deeds of a date prior to the act of 1833, as they were, and by a validating and repealing act for the others, such an act as that of 1841.

We think that the right was assignable.

There is nothing in this opinion adverse to the decision in *Doe, ex dem. Garlick vs. Robinson*, 12 *Geo. Rep.* 340.

In that case the decision was, that the drawer did not have such an interest in the land drawn, before the issuing of the grant, as was the subject of sale under a *fi. fa.* against him.

But there are interests which are assignable, although it may be that they are not the subject of levy, as that of the purchaser of land who has only a bond for titles, and who has not paid the purchase money. The interest of such a purchaser is only subject to be sold *after* the vendor has made a deed to the purchaser, and it is then subject, only by virtue of a special statute, *Cobb Dig.* 517. Yet he may assign it himself.

But, if the interest of the drawer was assignable, then it was assigned by the deed of Augley, and therefore some title or right was conveyed by that deed.

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Consequently the charge of the Court to the effect that that deed conveyed no title, was erroneous.

In respect to the other charge, we can only say that it lays down what is the general rule, but that the rule is to be taken in connection with the doctrine on which *Jonckin vs. Holland*, 7 *Geo. Rep.*, and other similar cases are founded. See *Drummond vs. Hardaway* 21 *Geo. Rep.* 433.

We grant a new trial, but only on the one ground of the first charge.

I remark, that, in my opinion, Augley could have maintained ejectment on his *draw*, whilst the grant was unissued; and therefore, that, in my opinion, his assignee can. This point, however, being, perhaps, beyond the precise case presented to this Court, is not determined by this Court.

Judgment reversed.

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No. 28.—RICHARD M. PARKS, plaintiff in error, vs. SAMUEL S. BAILEY, defendant in error.

Before land can be levied on and sold, to satisfy a judgment for the purchase money, the obligor in the bond for titles must make and file and have recorded in the Clerk's office of the Superior Court of the county, a good and sufficient deed of conveyance to the defendant for the land.

In Equity, from Whitfield Superior Court. Decision by Judge TRIPPE, at April Term, 1856.

This was a bill in equity filed by Richard M. Parks against Samuel S. Bailey, for injunction, and to set aside sale, &c.

The bill alleges that Bailey the defendant sold to complainant a valuable Hotel and lot in the town of Dalton, for

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twenty-five hundred dollars; two thousand he paid in cash, and gave his note for the balance, and took Bailey's bond for titles to be executed upon the payment of said note. After the note became due, Bailey instituted suit thereon against complainant and recovered judgment and issued his execution, which without the knowledge of complainant, he had levied upon said property in Dalton, and at the sale thereof, Bailey became the purchaser for the sum of four hundred dollars, being not more than one-sixth of the value of the said house and lot. That said house and lot was levied upon and sold, and bought by defendant without any notice thereof to complainant and without his knowledge, and without any deed or conveyance of the same having been executed to complainant by Bailey, or without recording thereof in the Clerk's office of the Superior Court as required by law. That there still being a balance due on said *f. fa.*—defendant is proceeding to the collection thereof against complainant. The prayer of the bill is for an injunction, and a cancellation of the Sheriff's deed and sale, and upon the payment by complainant of the balance of said purchase money, that defendant execute titles to said house and lot, &c.

The answer admits that defendant had not executed title to complainant at the time of the levy, but he did so before the sale; denies all fraud, &c.

Upon motion to dissolve the injunction, after the filing of the answer, the Court granted the same, and complainant by his counsel excepted.

UNDERWOOD, for plaintiff in error.

WRIGHT, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

One fact alone in this case, is a sufficient reason why the injunction should not have been dissolved. The 3d section

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of the Act of 1847, provides, "that when any judgment has been, or shall be rendered in any of the Courts of this State, upon any note or other evidence of debt given for the purchase of land, where titles have not been made, but bond for titles given, it shall and may be lawful for the obligor in said bond to make and file and have recorded in the Clerk's office of the Superior Court of the county, a good and sufficient deed of conveyance to the defendant for said land; and thereupon the same may be levied on and sold under said judgment as in other cases; *provided*, That the said judgment shall take lien upon the land prior to any other judgment or encumbrance against the defendant" (*Cobb* 517, 518.)

The answer admits that the levy was made before the conveyance to the defendant was executed, much less recorded; and such being the fact, and Bailey himself having become the purchaser, the sale is illegal and void.

And we are not disposed to weaken by construction this salutary law. By having the deed to the defendant made and recorded before the levy could be made, thirty days at least must elapse before a sale could be effected; and thus purchasers would be inspired with confidence to bid for the property, from the publicity given to the fact, that the title was in the defendant.

The Legislature in 1850, passed a similar law in behalf of the representatives of deceased obligees, evincing a settled purpose and policy on their part, in relation to this subject.

Judgment reversed.

No. 29.—McKENZIE, CADOW & Co., plaintiffs in error, vs
A. N. HARGROVE & Co. defendants in error.

No. 30.—A. N. HARGROVE & Co., plaintiffs in error, vs. Mc-
KENZIE, CADOW & Co., defendants in error.

These two cases were by consent, heard and argued together.

Judgment of the Inferior Court discharging an imprisoned debtor is void if the Court have not jurisdiction of the case, and it is no error for the Court to commit the discharged debtor to jail, if he appear at Court not prepared to comply with the terms of his bond.

Ca. sa. from Gordon Superior Court. Decision by Judge BROWN, at October Term, 1856.

The facts of this case were as follows: McKenzie, Cadow & Co., merchants of Charleston, South Carolina, recovered judgment against A. N. Hargrove & Co., and issued thereupon a *capias ad satisfaciendum*, against Augustus N. Hargrove, James E. Hargrove and Byron Hargrove, who constituted said firm of A. N. Hargrove & Co.; and A. N. Hargrove and Byron Hargrove were arrested by the Sheriff of Gordon county, and James E. Hargrove by the Sheriff of Paulding county, and the Sheriffs of these counties respectively took bonds for the appearance of the defendants, at the Superior Court of *Gordon county*. The plaintiffs were at the time citizens of South Carolina.

The defendants were surrendered by their securities to the Sheriff, in the vacation preceding the Court, and immediately thereafter, on the same day, they were discharged by the Justices of the Inferior Court of Gordon county, sitting as a *habeas corpus* Court, on the ground that plaintiffs were residents of another State, and no bond had been given by them or their agent or attorney for the maintenance and jail fees

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of defendants. No notice was given to the plaintiffs or their attorneys of defendants application for discharge, and it was admitted that a *week* had not passed without the jail fees having been paid as provided by the Act of 1847, and that defendants had remained in the custody of the Sheriff less than one day, before their discharge, and that they never were committed or imprisoned in the *jail*.

The case being called, plaintiffs counsel moved the Court for an order to enter judgment on the *ca. sa.* bonds of the defendants. The Court refused the motion, and plaintiff's counsel excepted.

Counsel for plaintiffs, then moved the Court for an order to commit the defendants to the custody of the jailer, they having failed to give the notice and comply with the provisions of the Act of 1823, for the relief of honest debtors, as required by the conditions of their bond, to which order defendant's counsel objected and after argument, the Court granted the order committing defendants to jail, till they should give the necessary notices, &c., as required by the statute; and counsel for defendants excepted.

It was agreed that the exceptions of both parties be embraced and carried up in one bill of exceptions and argued together.

HOOPER & RICE, represented by WALKER, for Cadow & Co.

FRANCIS, for Hargrove & Co.

By the Court.—McDONALD J. delivering the opinion.

The members of this Court concur in opinion in regard to a judgment of affirmance of both judgments of the Court below, but for different reasons. My brethren are of opinion that, inasmuch as the Act of 1845, (*Cobb.* 391,) declares that "*it shall not be lawful for any Court to discharge a debt-*

or from custody, because of the jail fees not being paid or secured, unless the Sheriff or Jailer shall give at least ten days prior notice in writing, to the plaintiff or his attorney, who shall be allowed that time, within which to pay or give security for the jail fees, and thereby prevent such discharge;” if the record shows that the discharge was in violation of this act, it shows a want or absence of the jurisdiction of the Court, and the judgment for that reason, is void. If there was no *power to act*, there was no jurisdiction. I cannot concur with my brethren in that view. It being my own opinion, that there is a distinction between the want of jurisdiction of a Court, and the unlawfulness of the judgment of the Court, and that the Legislature may pass an act that it shall be unlawful for a Court of unquestionable jurisdiction, to do a particular thing, or pass a particular judgment upon a specified state of facts; and if the Court proceeds to give judgment, it is good until it is set aside. The defendants in the *ca. sas.* were no doubt discharged in disregard of the statute just recited, and the decision of the Court ought to have been set aside for that cause, if there had been proceedings to set it aside, that is, admitting that the Court had jurisdiction. But if the Court had no jurisdiction it was a proceeding *coram non judice*, and the judgment was void without a proceeding.

In matters of this sort the Inferior Court is a Court of limited jurisdiction. The *habeas corpus* Act, does not extend to persons confined under civil process. The Judiciary Act of 1799, gives the Superior and Inferior Courts jurisdiction of such cases only as the *habeas corpus* Act extends to. The Act of 1803, is the first act which confers authority on any Court to discharge persons confined on civil process. The authority *to act* is not conferred by that statute on the Justices of the Inferior Court, except when a debtor is committed under an execution or *mesne* process, at the suit of a person residing out of the county or State, and the agent or

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attorney of the plaintiff, shall fail to give security for the maintenance and jail fees of the defendant, the maintenance to be paid weekly. In affirmance of this construction, I will refer to the Act of 1847, *Cobb*, 544. That act declares that if the jail fees are not paid weekly by the plaintiff, his agent or attorney, the Inferior Court *may, and are hereby authorized* to discharge, &c. Before these acts, the Inferior Court had no jurisdiction in such cases, and these confer jurisdiction on specified terms. Parties applying to the Court for relief under these acts, must present themselves with a case of which the Court has jurisdiction. The petition at least must show it. It ought to be supported by affidavit. If the petition shows a case of imprisonment, and failure to give security and pay, the Court has *jurisdiction* to hear the case. If the return should falsify the petition, or should show that the petitioner, on his arrest, had given bail or security, and had been surrendered by his bail or security; in the former case, it would be illegal to discharge, and in the latter case it would also be unlawful to discharge, unless the ten days notice required by the act, had been given; but if the party in these last cases were unlawfully discharged, the proceedings showing cases where the Court had jurisdiction, the judgment would be good until set aside. This is my view of the case. In neither of the cases presented in the record does the petition show a case in which the Court has jurisdiction, and all concurring in opinion that, as the case appears in the record, the Court had not jurisdiction, we unanimously affirm the judgment of the Court below.

O. J.

Judgment affirmed.

No. 31.—JACOB S. P. POWELL, *et al*, plaintiffs in error, vs.
CHAMBERLAIN, MILLER & CO., defendants in error.

An injunction of a suit on a note, was asked for on an allegation, that a certain credit had not been entered on the note. The credit, if it had been entered, would not have satisfied the note; but a portion of the note would have still remained due. No tender of this portion was stated.

The allegations as to the necessity of a discovery, were so uncertain as not to make it clear, that a discovery was needed to prove the defence at law. *Held*, That the injunction was properly refused.

In Equity, from Murray Superior Court. Decision by Judge TRIPPE, at chambers, March 1857.

This was a bill for discovery and injunction, filed by Jacob S. P. Powell, John B. Powell and James Edmunson against Charles V. Chamberlain, David Miller and Alexander Isaacs, partners, under the firm of *Chamberlain, Miller & Co.*

The bill alleges that on the 11th day of February, 1853, said S. P. Powell, made his promissory note payable to the Bank of Charleston, South Carolina, for \$1,225 62, ninety days after date, and that John B. Powell endorsed said note to Edmunson, and Edmunson endorsed the same to Chamberlain Miller, & Co., of Charleston, S. C. The note was protested for non-payment.

That about the 22d of February, 1854, said defendants sold to one William F. Amos, a bill of goods amounting to \$419 01, on a credit of six months. That about the 26th of May, 1854, said Jacob S. P. Powell shipped a lot of corn to defendants in Charleston, and which they sold for the sum of \$325 94, and placed the proceeds to the credit of their demand against Amos, contrary to the wishes and instructions of Powell. That said note has a credit of \$547 67, endorsed, dated 4th September, 1854, said payment having no connection with the corn shipped to defendants.

That defendants have instituted suit against compliants on said note, without giving credit thereon for the proceeds

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of said corn shipped to them. That they are unable to make their defence and the necessary proofs in relation to the sale of said corn, and the instructions as to the application of the proceeds thereof, without the testimony and discovery of defendants. The bill prays for an injunction, and that defendants answer the premises and set forth the letters, papers and memorandums in their possession, in relation to the sale and proceeds of said corn.

Upon a hearing and an examination of the bill, the Judge refused to sanction the same, and to grant the injunction.

To which refusal, complainants counsel excepted, and now assigns the same as error.

UNDERWOOD, for plaintiffs in error.

WALKER, for defendants in error,

By the Court.—BENNING J. delivering the opinion.

Was the Court right in refusing to order the injunction?

We think so, and for two reasons.

1st. The price of the corn if allowed as a credit on the note, would not pay off the note. And there is not in the bill any tender of the balance. And there is and can be no pretense of a right to an injunction to prevent the holders of the note from collecting this balance.

2d. The allegations of the bill, in respect to *discovery*, are so uncertain that it is impossible to tell from them, whether the complainants really need any relief or discovery—to tell whether they will not be able to prove their defense at law. Those allegations are as follows: “Your orators further show unto your honor, that they are unable to make the necessary proof of facts at law in reference to the said lot of corn, and the purpose to which it was sent to be applied, and are compelled to seek relief in equity.” If these allegations had been, that “they were unable to prove *the facts aforesaid*,” and “were unable to prove, *that the purpose*

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aforesaid was the purpose for which the corn was sent," the allegations would have been sufficiently certain.

And unless it *clearly* appears in a case, that the interposition of Court of Equity is needed, a Court of Equity will not interpose.

Judgment affirmed.

NO. 32.—DRURY CHRISTIAN, plaintiff in error, vs. JAMES A. R. HANKS, *et al.* defendants in error.

The husband, except through a provision for the wife, in consideration of the marriage, cannot protect his property by a contract with his wife antecedent to marriage, against the rule of law which subjects him to the payment of the wife's debts.

In Equity, from Murray Superior Court. Decision by Judge TRIPPE, at chambers, 1st September, 1856.

This was a bill for injunction by Drury Christian, against James A. R. Hanks, John S. Beall, and Esther A. Christian, wife of complainant.

The complainant alleges that in the latter part of the year, 1855, he intermarried with Esther A. Christian, then Esther A. Banks. That prior to the solemnization of their marriage, they entered into and executed a marriage settlement, in which it was recited that each had property and each was indebted, and it was therein agreed that neither should be liable for the debts and contracts before that time, made by the other, and that the property then owned by each, should only be liable for their respective debts. That complainant and his property were to be liable only for his own debts and contracts, and that said Esther A. and her property should be liable for her debts and contracts then or before made by her.

The bill alleges that at the time of said marriage, a judgment for about one hundred and fifty dollars existed against

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said Esther, and to which, the owner now seeks, by *scire facias*, to make complainant a party, and thereby render him and his property liable to the payment thereof.

The bill prays that defendants be perpetually enjoined, and restrained from proceeding with said *scire facias*, and making complainant liable for the debts of his wife, existing before their marriage.

The chancellor refused to sanction the bill and grant the injunction, and complainant's counsel excepted.

WALKER, for plaintiff in error.

HANKS, represented by UNDERWOOD, for defendants in error.

By the Court.—McDONALD J. delivering the opinion.

Drury Christian intermarried with Esther A. Banks in 1855. Before the marriage, they entered into an agreement, that the title of their property should not be changed by the marriage, but that the property of each should remain subject to the debts of the party to whom it belonged, which were contracted before the marriage, and that the property of each should be exempt from the debts of the other. Some of the wife's creditors were proceeding to enforce them against the husband and this bill is filed by the husband to enjoin them. The Court refused to order injunction, and his refusal is assigned as error. This marriage took place prior to the enactment of the statute, which prescribes the liability of parties entering into marriages. The rights of the parties depend, therefore, upon the pre-existing law. By that law, the husband cannot relieve himself from the obligation which a rule of law imposes on him by his marriage. He may stipulate with his intended wife for her benefit, but not for his relief against the rights of creditors, where the contract does not extend to a provision for the wife, in consideration of the marriage.

Judgment affirmed.

NO. 33.—THOMAS CHEEK, plaintiff in error, vs. JAMES TAYLOR, et al. defendants in error.

Where a judgment is confessed upon a note, barred upon its face by the statute of limitations, (which has been properly pleaded) by one who is not the attorney of the defendant—the counsel of the party being absent from Court, and the party himself unable to attend on account of both mental and bodily affliction, and there is manifest equity in the defence set up to the debt—Chancery will enjoin the proceeding at law until a hearing can be had; and if the equity in the bill be sustained by the proof, order the judgment at law to be satisfied, or decree a perpetual injunction against the *scire facias* to enforce it.

In Equity, from Murray Superior Court. Decision by Judge TRIPP, at chambers, 1st September, 1856.

This bill was filed by Thomas Cheek, complainant, against James Taylor, William Barnett and Elijah E. Wynn, defendants, to restrain defendants from proceeding to revive a dormant judgment by *scire facias*.

The bill sets forth that about the year 1836, James Taylor, then of the county of Lumpkin, but who has gone to parts unknown, being desirous of buying a certain lot of land in said county, employed complainant to go to the county of Putnam, where the owner resided to purchase it for him. Taylor agreed to pay complainant one hundred dollars, if he succeeded in making the purchase, and to pay his traveling expenses if he failed. He visited Putnam county twice in relation to this land, and succeeded in purchasing it. When complainant first went to Putnam, Taylor gave him some two hundred dollars to pay for the land, and \$60 to pay his expenses, and the surplus if any, to be retained in part payment of the \$100 that would be due him if he bought the land; and complainant gave his note for said sixty dollars, to be kept until the result was known.

That complainant was afterwards sued on said note, after it was barred by the statute of limitations, and owing to the sickness of complainant and the absence of his lawyer,

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judgment was obtained against him at September Term, 1844, in the name of Barnett, to whom the note had been transferred. Said judgment is now sought to be revived by *scire facias* and this bill prays for an injunction, &c.

The chancellor refused to sanction the bill and grant the injunction, on the ground that complainant is not entitled to the relief prayed.

WALKER, for plaintiff in error.

JOHNSON & JACKSON, represented by UNDERWOOD, for defendants in error.

By the Court.—LUMPKIN J. delivering the opinion

Taking all the facts of this case into consideration, we are inclined to think, that the bill should have been sanctioned and the injunction allowed. And so far from the delay which has intervened operating to the prejudice of the complainant, the very fact that twenty-one years has elapsed since the debt was due, and no attempt made to collect it, notwithstanding as the bill alleges, Cheek was abundantly able to pay it, is a strong circumstance to show that the creditor did not think, himself being judge, that the debt ought to be collected; and that it would be unconscientious to do so.

The affliction of Mr. Cheek extended over two terms of the Court, including the trial term of his case. He was unable to attend. The counsel Mr. Daniel, whom he had employed was absent from the Court; and although the note was barred upon its face by the statute of limitations, which was properly pleaded to the action, Mr. Waites, a partner of Mr. Daniel, a young and inexperienced attorney, as the bill charges, unknown to Cheek, and without authority to do so, confessed a judgment to the plaintiff, for the principal and interest of the note, together with the costs of the suit. Under all the circumstances of the case, Cheek should not be bound by the judgment which is *dormant* and

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now sought to be revived by a *scire facias*. If he can establish the facts alleged in his bill, either the judgment should be decreed to be satisfied, or the suit to revive it perpetually enjoined.

Judgment reversed.

No. 34.—FREDERICK S. S. HUNT, plaintiff in error, vs. JOHN W. BURK, defendant in error.

For money paid on an illegal contract, without fraud, an action lies immediately to recover it back, and the statute bar is four years.

Assumpsit, from Cass Superior Court. Decision by Judge TRIPPE, at March Term, 1857.

This was an action of assumpsit, by Frederick S. S. Hunt, against John W. Burk, to recover back the sum of five hundred dollars paid by Hunt to Burke, under the following state of facts agreed to by counsel for the parties.

Samuel J. Ray, Samuel T. Chapman, and defendant, John W. Burk, were candidates for *State Printer* at the session of the Legislature of November 1849: before the election came on, they entered into a copartnership, and agreed to unite their interests in the contest and to put forward Ray as the candidate, upon the understanding and agreement that Ray, if elected, was to do the printing, pay all expenses, and then the net profits to be equally divided between Ray, Chapman and Burk. The election came off and Ray was elected, and Burk soon afterward returned home (Cassville) and sold his interest in said public printing and the profits thereof to the plaintiff, Frederick S. S. Hunt, for the sum of five hundred dollars. He made the transfer

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to plaintiff in writing, assigning to him all his interest of one-third of the profits of said printing and authorized Ray to pay over the same to said plaintiff or his order, so soon as he drew the same from the State Treasury; defendant assumed no responsibility in the event of Ray's failure to pay, but simply sold and assigned his interest, and plaintiff was informed of the facts and circumstances under which that interest arose and was claimed. Plaintiff subsequently fearing that there might be some difficulty about the matter, saw Burk and wanted him to promise to see it paid, which he refused to do, but did get Capt. Wofford to go to Macon and see Ray, who gave an acknowledgment of the claim which Hunt received. After the printing was done and the money received by Ray or his representatives, plaintiff demanded the same which was refused, and Ray, who is dead, was wholly insolvent. The sale and assignment of said interest, was made in December, 1849, to plaintiff; and the action was commenced 8th October, 1854.

The defendant pleaded the general issue, and the statute of limitations:

The judgment of the Court was, that the contract was not void but valid and binding on plaintiff; and that if it was not valid, the plaintiff was barred by the statute of limitations, which commenced running from the making thereof.

To this decision plaintiff excepted.

WRIGHT, for plaintiff in error.

JOHNSON, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

If the plaintiff had a right to recover back the money from the defendant on the assignment of the printing contract, it was on the ground that that contract was illegal, as the assignment imposed no liability on the assignor, but was sim-

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ply a transfer of the claim. There is no proof of fraud in the sale, and by the agreed evidence in the case, it was without liability on the part of the assignor. The right of action accrued to the plaintiff immediately on the payment of the money, if the contract was illegal, it being on that hypothesis alone, that he could be liable at all. To this action the statute bar is four years, and that time having run, the right of action was barred at the time the suit was instituted.

Judgment affirmed.

No. 35.—LEONARD C. HUFF and WILLIAM CHAMBERS, plaintiffs in error vs. CHARLES J. McDONALD, and others, defendants in error.

- [1.] If one tenant in common, receive more than his just share, he is liable to account to his co-tenant for such surplus, and for all the profits which he makes out of such surplus; and if there is proof that he used such surplus, and no proof as to whether he made any profits out of it or not, the presumption is, that he made profits out of it, and profits at least equal to the interest on the value of such surplus calculated at the legal rate.
- [2.] If one tenant in common, receive more than his just share, the statute of limitations does not commence running in his favor, so as to bar an action of account by the co-tenant, until the tenant begins to hold such surplus adversely to the co-tenant, and knowledge of that fact comes to the co-tenant.

In Equity, from Cass Superior Court. Tried before Judge BROWN, at September Term, 1856.

The bill alleges that complainant, Charles J. McDonald, on the 2d of May, 1843, purchased at a sale made by the

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Commissioner in Bankruptcy for the State of Georgia, the *one undivided quarter* of the south-east half of lot No. 210, in the 2d district of Carroll county, sold as the property of John T. Rowland, a bankrupt. That sometime in the year 1843, he purchased one other undivided fourth part of said south-east half of said lot, from one Littleton Atkinson, but the deed of conveyance from Atkinson to complainant was not executed and delivered until the 8th of October, 1844, at which time he also conveyed and assigned to complainant, all his right, title and interest to all damages for trespasses in digging gold on said lot.

The bill further alleges that in the year 1842, the defendants Huff and Chambers, entered upon said premises, which contained a valuable gold mine, and engaged extensively in working the same, and continued for sometime their mining operations thereon, and dug up and appropriated to their own use, gold amounting to a very large sum; that they also leased or rented to others the right and privilege of mining on said premises, and received large sums as rent for said right and privilege thus to dig gold; that defendants refuse to account with and pay to complainant the share which is due and coming to him from said mining operations and from said rents as joint owner or tenant in common of said premises; that he has no means of proving the amount of gold dug, the number of hands engaged, and the expenses of the mining operations, except by resorting to the consciences of the defendants. The bill prays for a discovery and account; that the books kept of their transactions may be produced; and that said defendants or either of them, be decreed to pay over to complainant the share or amount found due to him from them or either of them upon such accounting, &c.

The defendants demurred to the bill, for want of equity, and because complainant had adequate remedy at law for the trespasses complained of; and because no assignment of damages for trespasses committed before complainant pur-

chased from Atkinson, could give him a right to a recovery, on account of said trespasses ; which demurrer was overruled by the Court, and defendants excepted.

And answering, they admit that they entered upon said premises about the 1st Aug., 1842, and continued thereon until about the 25th Dec., 1843, and did work the mines thereon, and dig up and carry away and appropriate to their own use all the gold found, and they deny complainant's right to any share of the same or to have any account therefor from them; they say that Chambers purchased from one William A. Maxwell, one *fourth-part* of said south half of said lot, in the year 1842, and obtained from him a bond for titles to the other fourth part of said premises, said bond made by one Benjamin Chapman, but was not assigned in writing to defendant, and under this purchase they entered upon said lot, and engaged in the business of digging gold thereon. They knew that there was other just owners or tenants in common, but they were wholly ignorant of any title or interest of complainant in said premises, and were informed that it was the agreement or understanding of all the owners, that any one could enter upon and dig for gold without liability to the others for rents or otherwise, and with this information and under this belief, they entered upon said lot and commenced digging, and they did rent to others the privilege of digging. But they deny that they ever obtained a hundred thousand dollars worth of gold, as charged in complainant's bill, or any thing like this amount ; or two thousand dollars for rent, but they affirm, that after working on said premises until about the 25th of December, 1843, they came to a settlement, and the amount of gold they made on said south half of said lot, after paying and deducting therefrom all the necessary expenses, was about three hundred dollars, and this—without allowing defendant Chambers anything for his services in superintending the business, and if a reasonable sum should be allowed for those services, nothing was made. They are unable to state how much gold was dug, or the

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number of hands they had employed—from whom the negroes were all hired; the prices paid was about ten dollars per month. The books, in which was kept the names of the hands hired, the prices paid and the amount of gold dug, up to the time they quit their operations and made their settlement, has been lost or mislaid, and this was occasioned by the removal of defendants to places distant from their mining operations. They do not admit the tenancy in common with them of complainant—deny his right to receive any part of the gold dug by them, and hold him to a strict proof of his title, &c.

The case coming on to be heard, after the reading of the bill, answer and replication, the complainant offered in evidence,

1st. A grant from the State of Georgia to John Martin, for lot of land No. 210, in the 2d district of Carroll county, dated 17th June, 1830. Then a deed from John Martin to Willis Rabun for the same lot, dated 5th August, 1830. Then a deed from Willis Rabun to John T. Rowland and Littleton Atkinson to south-east half of said lot, dated 28th December, 1838, a deed from Atkinson to Charles J. McDonald to the one undivided fourth part of the said south-east half of said lot, dated the 8th October, 1844, and recorded the 6th April, 1847; also a deed from M. Myres, general or official assignee in bankruptcy for the district of Georgia, to Charles J. McDonald, for the undivided one quarter of the south-east half of the same lot, No. 210, sold as the property of John T. Rowland, dated 2d May, 1843. To the introduction of this last deed, counsel for defendants objected, on the ground that no judgment, order or decree authorizing, said sale, had been shown or produced. The Court overruled the objection, and defendant's counsel excepted.

2d. Complainant then offered in evidence the following instrument of writing, viz :

“For value received and in consideration of the sum of three hundred dollars to me in hand paid, the receipt where-

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of is hereby acknowledged, I, Littleton Atkinson, of the county of Macon and State of Georgia, have bargained, sold, and assigned, and by these presents do bargain, sell and assign to Charles J. McDonald, of the county of Cobb, and said State, all my right, title and interest, both at law and in equity, to damages for trespasses in digging gold on lots of land Nos. 209, 210 and 205, all in the second district, of the county of Carroll, with full authority to use my name in the recovery thereof.

In witness whereof I have hereunto set my hand and seal, this eighth day of October, A. D. 1844.

L. ATKINSON, [L. S.]

JAMES L. GREEN, J. P.

Counsel for defendants objected to the introduction of this paper, on the ground that it only authorized complainant to use the name of Atkinson, and he could maintain no action on it in his own name, and the right to bring suit for a trespass not being assignable, the same was void, which objections were overruled by the Court and the paper admitted and allowed to go to the jury.

3d. Complainant then submitted the following depositions of witnesses examined by commission,

Solomon Morrison.—To the first interrogatory he answers, I know the parties.

To the second interrogatory he answers. I did superintend the digging for gold, for the defendants Huff and Chambers, on the south-east half of lot of land, No. 210, in the 2d district of the county of Carroll, from some time late in the spring of the year 1843, till Christmas thereafter, and from the 1st of January, 1844, as well as I can recollect, the whole year, and from the 1st of January 1845 until some time in May of the same year. I suppose the average of hands was about 20, rather more than less than that number, they were principally blacks. I superintended about two years on said part of said lot; I suppose the average work of the hands was about a pennyweight to the hand per

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day during the time of my superintending, and was delivered over to both the defendants and to a Mr. Jarnagin, agent for defendants.

To the third interrogatory, he answers: The defendants did lease out parts of said lot to other persons, Parker Rice, George Bivins, William Bivins and old man Bivins, whose given name I do not remember, and to a Mr. Pettis, whose given name I do not recollect; Rolan Talbot and his son William Talbot, and a great many others I cannot recollect. I think they paid the eighth of what they dug up, to defendants, and they did reserve the best digging ground for themselves. I would further state that a man by the name of Garrison, worked also on said lot, with black hands; there were always hands at work on said lot, besides defendants' hands.

To the fourth interrogatory, he answers: I worked the two first years, 1843 and 1844, for both defendants, and the year 1845 for L. C. Huff, as I think defendants dissolved copartnership on the 25th of December, 1844. The work, as before stated, was a pennyweight to the hand, which was paid over to defendants during their partnership, after which it was paid over to L. C. Huff.

To the fifth interrogatory, he answers: I do not know of anything more that would benefit the complainant.

Cross Examined.—First interrogatory, he answers: I have stated nothing from hearsay or belief—nothing but what comes from my own knowledge and recollection.

Second interrogatory, he answers: The hands were removed from this lot in 1844, thinking we could do better on another lot, but finding that we could not, we returned on the said lot, 210; while I was absent from this lot, Mr. Huff rented it to Mr. Rice, who made money. When I returned, Mr. Rice left the place; I commenced work again on the same streak, and made money and good wages, and Rice still worked on the same lot.

Third interrogatory, he answers: I think my opportunity

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for knowing how much was made was near about as good as defendants, and would as soon trust to my recollection as their oath.

Fourth interrogatory, he answers: Some days we made over wages, others not so much, but as I have before stated, I think the average was over a pennyweight per day to the hand; that a person accustomed to mining could tell pretty much what was made.

Fifth interrogatory, he answers: We worked on a rock for a month, and I think, made expences. I left them while they were at work on the rock.

Sixth interrogatory, he answers: Huff & Chambers ditched the land to work themselves, and when they quit other hands worked more or less in the same ditches.

Seventh interrogatory, he answers: I know of nothing more that will benefit the defendants, nor nothing to prove what they have sworn to be true or untrue, as I do not know what they did swear.

Thomas M. Tolbert.—To first interrogatory, he answers: He knows the parties.

To second interrogatory he answers: That he has dug for gold on the south-east half of said lot of land, No. 210 in the second district of Carroll county, Georgia, and witness does not recollect in what year he worked on said lot, but he worked there the same time and with the same hands that were in the employment of Mr. Huff the defendant, and that he, witness, was also in the employment of Huff, and worked there in said employment two weeks or longer, upon the south-east half of said lot of land, in the second district of Carroll county. William Chambers, one of the defendants, was, witness thinks, concerned with said Huff, and was frequently there giving directions, and that, when witness dug for gold on the south-east half thereof, he made from three quarters to a pennyweight per day, and the ground worked by Huff and Chambers was better than the ground worked by witness; that he, witness, often heard Solomon Morrison,

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the boss or superintendant of the hands of Huff and Chambers, say that they made from a pennyweight and a half per day, to two pennyweights per day to each hand, and that the ground witness worked was refuse ground, that they, the defendants, would not work, and that the hands superintended by Morrison were working on the south-east half of said lot of land, when he, witness, heard Morrison say as above stated. Parker Rice, James D. Powell and another man by the name of Bivins, worked there at the same time, and worked for a long time on their own hook.

To the third interrogatory, he answers: That he does not now recollect of hearing Huff say how much he made to the hand per day, for Huff, witness thinks, wished that kept a secret. Witness' brother, Richard Tolbert, was at the same time in the employment of Huff and Holland working on another lot near by, and the hands overseed by said Richard Tolbert, returned the gold dug by them every Saturday night to Huff, and witness heard his brother, the said Richard say, that Morrison and the hands under Morrison were doing about as well as he and those under him, and that he was making upon an average, from one pennyweight and a half to two pennyweights per day to the hand. Witness knows nothing more that would benefit the parties.

William Gilbert.—To the first interrogatory, he answers: That he knows Charles J. McDonald and Leonard C. Huff, but does not know William Chambers.

To the second interrogatory he answers: That he himself did not lease the privilege of digging for gold on the south-east half of lot No. 210, in the second district of Carroll county, from the defendants, but that he worked with George Bivins on the south-east half of said lot No. 210 in the second district of Carroll county in the year 1845; and understood that said Bivins had leased the privilege of digging for gold, from A. M. Stokely, and the rent money was paid or the gold that was dug was sold to Stokely. I cannot now say precisely the amount of gold we made per day, but think

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it would have averaged a pennyweight per hand per day ; worked five hands.

To the third interrogatory he answers : The defendant, Leonard Huff, was digging for gold on the same lot of land at the same time, and the ground on which Huff was digging, was said to be much better for gold than where we were digging ; I saw them rocking down one or two evenings, but could only guess at the amount that was made per hand for that day, it appeared that they were making good wages, and I should suppose that they made from from 40 to 50 pennyweights on that day to that rocker.

To the fourth interrogatory he answers : That all he does known more than he has already stated is, that that part of the lot where Huff was digging, was considered first rate mining ground, so much so that said Huff would not give any one a lease to dig for gold on the branch or in the bottom. And further this deponent saith not.

Zachariah A. Rice.—To the first interrogatory he answers : He knows the parties.

To the second interrogatory he answers : That he did operate for gold on what was then called the Maxwell lot. It is situated about one mile and a half from Villa Rica, and in the county of Carroll ; does not know the number of the lot or district ; cannot say what part of the lot it was he operated on, it was near the junction of the branches, one of which runs through the lot ; cannot say whether the other does or not. This was in the early part of the year 1844 ; worked about four months ; his hands averaged about one-dollar per day ; and paid toll to Leonard C. Huff ; paid one eighth for toll ; he says he worked in company with Mac Hensly ; they worked eleven hands during that time.

To the third interrogatory he answers : That some places on said lot was richer than others, and the best work he did was five dollars to the hand per day, for a few days only.

To the fourth interrogatory he answers : That Leonard C. Huff commenced operating for gold near to where he was

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working, about the time he quit; cannot say whether it was on the same lot or not, nor does not know how long the defendant Huff operated; cannot say what was the quality of the ground upon which the said Huff operated, but supposed it to be as good as that worked by himself. Huff commenced work, to the best of his recollection, in May, 1844; the length of time he worked, he cannot say; he worked some fifteen or twenty hands and superintended by Morrison; thinks his name was Sol. Morrison.

To the the fifth interrogatory he answers: That the value of the tools necessary for digging gold, would be about five dollars per hand per year; knows nothing more.

Nicholas F. Chambers.—To the first interrogatory he answers: I do.

To the second interrogatory he answers: I dug gold on a lot called No. 210, in the second district of Carroll county, and I think, on the south-east half of said lot, and in and during the years 1845 and 1846; I cannot be positive about the amount, but can safely say, I dug between nineteen hundred and two thousand pennyweights during the time mentioned. The rent to be paid was one-eighth, one-fourth of which I retained as joint owner of the lot, one-fourth of which I paid to Morrison and Williams, and promised to pay the remaining half to Leonard C. Huff.

To the third interrogatory he answers: I know of nothing more that can benefit the complainants.

Cross Examined.—To the first interrogatory he answers: I have no means of knowing the amount of clear profits made by defendants while working said lot; I would feel bound to believe the defendants on their oaths, never having had any reason to believe otherwise. I never paid any rent or promised to pay any to William Chambers for that lot; knows nothing about their clear profits.

To the second interrogatory he answers: I know nothing more that could benefit the defendants.

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A. H. Harrison.—To the first interrogatory he answers: I do.

To the second interrogatory he answers: To the best of my recollection, they were in partnership in gold digging in the year 1842; I cannot recollect the exact time when they dissolved partnership, I think they were, to the best of my recollection and belief, they were engaged in work on lots of land Nos. 208, 209 and 210, in the second district of Carroll county.

To the third interrogatory he answers: They had a settlement of their gold digging operations, I do not know, but my impression is, that they had a settlement which embraced their whold business; cannot recollect the exact time the settlement was made.

To the fourth interrogatory he answers: He knows nothing more.

Cross Examined.—To first interrogatory he answers: My recollection is that they had dissolved previous to the settlement; we made the settlement from the entries made in their books, and from what Huff and Chambers said at time of settlement to the best of my recollection, the amount was three hundred and one dollars.

The second interrogatory : Is it not frequently the case in the Carroll mines, that hands make, some days four or five times as much as others, and do not companies of hands frequently fail to make expences, and sometimes not one-half or one-fourth of their expences, including hire and everything else.

To second interrogatory he answers: It is frequently the case that they do, and it is also frequently the case that they do not make one-half or one-fourth of their expences including everything.

To third interrogatory he answers: I know nothing more

E. W. Holland.—To first interrogatory he answers: He knows the parties.

To second interrogatory he answers: That the defendants

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Huff and Chambers were engaged in digging gold in copartnership, from the fall of 1842 to the spring of 1844, on lots Nos. 208, and 210, in the second district of Carroll county.

To third interrogatory he answers: That in the spring of 1844, after Huff and Chambers had dissolved copartnership, he, in connection with Mr. Harrison, was called upon to arbitrate and settle some business between the defendants, and among other matters was to settle the amounts between the parties in reference to their gold operations upon the Nos. before named, 208 and 210, and after deducting expences for their operations on No. 210, there was a profit of about one hundred dollars, but this profit was more than consumed in employing a suitable person to superintend the work on lot No. 208—this was profits made.

To fourth interrogatory he answers: He knows nothing more that would benefit plaintiff.

Cross Examined.—To first interrogatory he answers: The settlement made between the defendants was made after they dissolved, which was in the spring of 1844.

To second interrogatory he answers: That in operations in the Carroll mines, it would require a hand to make from three-quarters to one pennyweight per day per hand to pay all expences.

To third interrogatory he answers: A hand making only from three-quarters to one pennyweight per day, would make nothing clear after paying all necessary expences.

To fourth interrogatory he answers: That twenty dollars a month will not more than pay the expences of a hand in digging gold, when he is furnished with tools, clothing and subsistence per month.

To fifth interrogatory he answers: That Huff and Chambers made money in their gold digging operations on lot No. 208 before named, but they only made about one hundred dollars clear money out of their operation upon lot No. 210 before named. Huff and Chambers being both interested in their gold operations upon both the lots, Nos. 208 and 210,

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one superintended the hands upon one of the lots and the other upon the other lot ; in the settlement thus made, neither charged anything for their own services ; if any charge had been made for superintending the hands upon lot No. 210, nothing would have been realized as a profit ; companies digging gold frequently fail to make anything by the operation.

Isaac E. Bartlett.—To first interrogatory he answers: That he does.

To second interrogatory he answers: During the year 1843 the amount of gold dug by Solomon Morrison, as overseer for Huff and Chambers, was:

	<i>Dwt.</i>	<i>Gr.</i>
To Leonard C. Huff,	7312	17
To Wm. Chambers,		96
Paid in Charleston for goods bought for Huff and Chambers,		149
	— — —	
		7557 17

To third interrogatory he answers: There were a good many lessees working on said lot, but that without reference to the books, he cannot state what amounts were dug and returned.

Cross Examined.—To first interrogatory he answers: That he does not know that he has ever seen the corners or stations of said lot, and only knows the lot from having heard Huff, Chambers and others say it was lot No. 210 of the second district of Carroll.

To second interrogatory he answers: He knows nothing further.

Re-Examined.—To the second interrogatory he answers: That he has the original statement referred to in said interrogatories, and which original statement is hereto annexed, and to the best of his recollection it was made in the early part of the year 1844. It is a true statement and was made from the books kept by him for Huff and Chambers, and was at the request of Leonard C. Huff.

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To third interrogatory he answers : That he knows nothing more that will benefit the plaintiff.

Amount of gold dug by Solomon Morrison, for Huff and Chambers, on lot No. 210, year 1843.

	Dcts.	Grs.
Amount received by L. C. Huff,	7312	17
“ “ “ Wm. Chambers,	96	00
“ paid for goods bought in Charleston,	149	—
	7557	17

Cross Examined.—To first interrogatory : That he knows that the gold mentioned in said memorandum was taken from the south-east part of lot No. 210 ; he knows it from his own knowledge of said lot, and what he has heard the defendants say ; he cannot say, particularly, whether said defendants worked on both halves of said lot ; but he is inclined to think they did work some on the other half of said lot.

To second interrogatory he answers: That there is no mistake in the number of the lot, it was No. 210, as mentioned in said memorandum ; he made the memorandum at the request of Leonard C. Huff, to show the amount of gold dug on the south-east half of said lot. by Huff and Chambers in the year 1843 ; said memorandum was made, to the best of his recollection, in the early part of the year 1844.

Edwin Noland.—To first interrogatory he answers: I know the defendants. I do not know the plaintiff.

To second interrogatory he answers: I was employed by, and worked for, Huff and Chambers, the defendants, some time during the year 1843 or 1844, digging for gold on the south-east half of land No. 210, according to the information I have had concerning the lines of said lot ; my wages were the usual wages paid to hands at that time ; say fourteen or fifteen dollars a month, hands finding themselves. The number of hands employed varied, some times fifteen or twenty, and at others, twenty-five or thirty ; I do not know how long defendants worked on said lot ; I worked there in

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their employ three or four months; I do not know the amount of wages paid by the defendants; the common hire of a hand, I have already stated, was fourteen or fifteen dollars a month.

To third interrogatory he answers: I do not know any thing of the amount dug by the defendants, it not having been made my duty to keep any account; I have no means, nor ever had any, of ascertaining it, or any average of any amount dug; nor can I say what was the average per hand of the hands employed.

To fourth interrogatory he answers: I worked some time in 1845, on said lot, in company with one Solomon Morrison, with a small force of four or five hands, and not exceeding a month in time, during which I remember our average was not more than half a pennyweight to the hand, about half this time the work alone was done on the north-west half of said lot: our lease being on the dividing line, according to my understanding; to the best of my recollection, we paid the one-eighth of the amount dug, for the privilege of mining; I have no means of ascertaining or refreshing my memory as to the amount dug or the amount of rent paid by us. I worked some time in 1848, in copartnership with my brothers William, Seaborn and Samuel Noland, under a lease from Leonard C. Huff, paying the eighth toll to Messrs. Merrell C. and William H. Arotey, as agents for said Huff. I am now working on said lot, in copartnership with my brothers Samuel and Seaborn Noland, under a lease from Leonard C. Huff, on the south-east half of said lot, paying the tenth for rent, but I cannot recollect how long I have been working. I have paid the toll weekly, semi-monthly, or monthly, to Mr. Abel H. Harrison, as Mr. Huff's agent, as my necessities or inclinations prompted me.

To fifth interrogatory he answers: I have already stated all I know or can remember about the matter in question.

Cross Examined.—To first interrogatory he answers: There was certainly more gold dug some days than others.

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The other part of this interrogatory I have already answered in my answers to the direct interrogatories.

To second interrogatory he answers: I have not the least idea.

George Noland.—To first interrogatory he answers: I know the defendants, but have no acquaintance with the plaintiff.

To second interrogatory he answers: I was in the employ of the defendants Messrs. Huff and Chambers, in and during the year 1843, two or three weeks of which time I worked on the south-east half of lot of land No. 210 in the second district of Carroll county; my wages were fifteen dollars a month, and find myself, that being the common price for hands at that time; I have no recollection of the number of hands at work on the lot, for Messrs. Huff and Chambers; nor how long they worked; the customary price for hands was fifteen dollars a month, hands finding themselves.

To third interrogatory he answers: During the time I was at work on said lot, the company with which I was working generally made or averaged about a pennyweight a day to the hand; I know nothing of the amount dug or the average product made by all the hands employed, and I do not know the number of hands at work at that time, or at any other time.

To fourth interrogatory he answers: I never have at any time worked on said lot on my own account, nor for any other person, except the time specified above.

To fifth interrogatory he answers: I have already stated all I know about the matter in the foregoing answer.

Cross Examined.—To first interrogatory he answers: I believe we made a little more than we did at other times, and sometimes we did not make quite as much as we did at other times, and sometimes neither one nor the other, much or little, but sorter betwixt and between, but no two days exactly alike, that I can remember; the first part of this interrogatory I have already answered in my answer to the direct interrogatories.

Second interrogatory : Do you know how much gold defendants made on said lot ?

To second interrogatory he answers : I do not.

James D. Powell.—To first interrogatory he answers: That he has been acquainted with the parties.

To second interrogatory he answers : That he did operate for gold on the south-east half of a certain lot of land in the second district of Carroll county : but cannot speak particularly as to the number of the lot. As well as witness recollects, a man named Roberts had a farm lying on the north side of the lot that he operated on ; and a man named Jarnagan owned land on the west, and John R. Wick owned land, as witness understood, on the south side of said lot ; Solomon Morriscn was superintending Leonard C. Huff's hands that were operating on another part of the south half of the same lot, the same year ; it was in 1844 that witness and the company witness was operating with, were at work on said lot for gold. William Chambers had been operating on the same lot the year before ; at the time that witness and those working with him were working on the south-east half of said lot, namely, in the year 1844 ; Leonard C. Huff was operating on the same half of said lot, that witness and witnesses' company operated on—that is, on the south-east half of said lot. Witness does not know whether William Chambers was concerned with Leonard C. Huff or not ; the work was called Huff's work. Leonard C. Huff operated with about ten or fifteen hands, superintended by Morrison, at the time witness and his company were operating on the south-east half of the above mentioned lot of land. He was operating under a lease from Leonard C. Huff, but witness understood at that time, or has understood since, that the plaintiff had an interest in said lot.

To third interrogatory he answers : That he cannot answer exactly, what amount of gold he and his company made per day to the hand, while operating on said lot ; some days they would not make a quarter of a dollar to the hand, and

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some other days they would make a dollar a day or over ; one day we made five dollars. He, witness, remembers that his company consisted of twelve hands, and at the end of the month, when they came to sell the gold, they had made a little over four hundred dollars worth of gold, but that was the best month's work they did on an average of all the time witness worked on said lot. Witness supposes that his company made ninety-five cents to the hand. Leonard C. Huff worked some ten or fifteen hands ; witness does not know of any other hands that were worked on that half of said lot by Leonard C. Huff, except those superintended by Solomon Morrison ; there were other persons operating on that half of said lot in 1844, under leases from Leonard C. Huff ; as well as he can recollect, Garrison and Moody worked a while on said lot. Anderson Hensley also carried on some work on that part of said lot ; Nathan Camp also worked some on that half of said lot, in the year 1844.

To fourth interrogatory he answers : That Leonard C. Huff worked the best ground on said half lot, and his hands did better than we did, but witness cant tell how much they made to the hand.

To fifth interrogatory he answers : That he knows nothing more in favor of the plaintiff.

Solomon Morrison.—To first interrogatory he answers : I do.

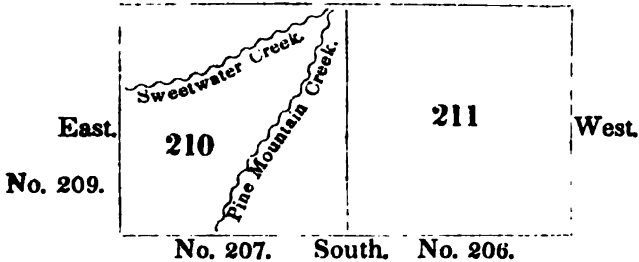
To second interrogatory he answers : That the gold was dug from the part of the lot No. 210 in the second district of Carroll county, which lies south-east of Sweetwater Creek, where it makes a sudden bend to the north or north-east ; and the north-west half of said lot, was dug by Jesse Wooton and Jonathan Davis, and others, under a purchase or lease from Jesse Roberts or his father.

To third interrogatory he answers : That Sweetwater creek runs through lot No. 210 of Carroll, and a small creek or branch comes in from lots Nos. 206 and 207, which is

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known as the Pine Mountain branch, as near as he can describe it, agreeably to the annexed diagram :

No. 239. North. No. 238.



Sweetwater creek enters the north and south line, dividing lots Nos. 209 and 210, considerably north of the center of the lots, and that Sweetwater creek does not run into lot No. 211, it runs out of lot No. 210, nearly north, cutting through the corner of lot No. 239, and then takes a north-east course through lot No. 238.

To fourth interrogatory he answers: That he has this morning been on lot No. 210, and examined it, and he is satisfied that the answers to his first interrogatories, taken in this case, were correct, particularly in this point, that the work he done for Huff and Chambers on lot No. 210 was nearly all of it, or all of any importance, done on the south-east side of the lot, and on the south side of Sweetwater creek, he thinks he worked on said lot about two years with an average of twenty hands, and thinks he made an average of a pennyweight of gold to the hand per day, and that he did not know how the lot was divided, and from Mr. Huff's description of the ground, believes that the lot was equally divided from east to west, which would have thrown most of the work which he had done on the north side of the lot, and that when he answered the second set of interrogatories he had not been on the lot for some years, and his mind was bewildered by Mr. Huff's statements of the situation of the lot; that he did work for a short time, say a month or more, on the north side of Sweetwater creek, near the west line of

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lot No. 210, on some ground then worked by Mr Jarnagin ; all the balance of the work on the lot, for Huff and Chambers, was done on the south side of Sweetwater creek, and on that part of the lot conveyed by Willis Rabun to John T. Rowland and Littleton Atkinson, and there were at times, large numbers of hands working on said lot No. 210, under the authority of Huff and Chamber as lessors ; he thinks the average number of lessees, on the lot for the year 1843 and 1844, of Huff and Chambers, was about twenty ; at least the lessees all worked on the south side of Sweetwater creek, and that he knows nothing further that will benefit complainant.

It was admitted that gold taken in the Carroll mines, was worth a dollar a pennyweight, at the mines.

The complainant here closed his case.

The defendants then read in evidence, to the jury, the following testimony :

A deed from William A. Maxwell to William Chambers to the one-fourth of the undivided south half of said lot, dated 16th day of July, 1842, and the following answers to interrogatories :

Solomon Morrison.—To first interrogatory he answers : He commenced working and superintending hands for Leonard C. Huff, in the year 1840, and worked that year on what is called the hill lot, I believe 224, in the 6th and part of the Clopton lot ; and 1841 on the same ; in 1842 he worked up to August for said Huff on No. 209, in the second district of Carroll ; and after the commencement of August, of that year, he commenced superintending the hands of Huff and Chambers, the defendants, on lot No. 210 in the second district of Carroll.

To third interrogatory he answers : He commenced superintending their hands on lot No. 210 in the second district of Carroll, he thinks in 1842, and continued to work on lot No. 210, he thinks, until September, 1843 ; I then went on

to another lot, called the black gravel lot, number not recollected, and worked on that lot until Christmas 1843, and then Huff and Chambers dissolved partnership, as he understood, and he superintended the partnership hands no longer; while I was overseeing their hands, they varied; at first there was not more than seven or eight, and it was increased so that the average number of hands, I suppose, was about twenty for all the time, it being sometimes more and sometimes less.

To fourth interrogatory he answers: He kept no account of the gold dug by defendant's hands during the time he superintended them.

To fifth interrogatory he answers: He knows nothing more in favor of defendants, only that he handed over the gold to the defendants and Mr. Bartlett, in a rough state, without being neatly cleaned; he worked on the north-west half of the lot, thinks he averaged a pennyweight or a pennyweight and a half to the hand.

Cross Examined.—To first interrogatory he answers: He thinks the defendants had some work done on the south-east half of said lot, before he was employed, he thinks only for a few days before he was employed.

To second interrogatory he answers: He does not know that Huff superintended any hands on said part of said lot; Huff and Chambers dug and had gold dug from that part of said lot; he does not know how much gold they dug from said part of said lot.

To third interrogatory he answers: There were at times, a large quantity of hands working on said lot, under the authority of the defendants; other times, there were but few, I suppose the average number of hands for the year 1842 and 1843 worked by them, besides what he worked, was something like twenty; commencing, he thinks, in August 1842, and perhaps not more than an average of fifteen for about sixteen or seventeen months; from his knowledge of the ground, so far as he tested it, he found it poor; he would

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suppose that the hands might average from one-half to three-fourths of a pennyweight per day on that part of the lot.

To fourth interrogatory he answers: That he gave his evidence before as to his opinion of the quantity of gold dug per hand on the part of the lot on which he worked to wit: he worked on the north-west half of said lot, and superintended the hands of Huff and Chambers.

To fifth interrogatory he answers: That he knows nothing more.

Isaac E. Bartlett and Edmond W. Holland.—To first interrogatory they both answer: We do.

To second interrogatory they both answer: That Isaac E. Bartlett kept the books of Huff and Chambers, when they were digging gold on the south-east part of lot No. 210 in the second district of Carroll county. Isaac E. Bartlett says that when Mr. Huff and Mr. Chambers tried to make a settlement about the gold digging, done by them on lot No. 210 in the second district of Carroll, Mr. Chambers was dissatisfied, as they had not made any money clear, and they referred their settlement to E. W. Holland and A. H. Harrison, who made the settlement between them. I do not know what was made clear of expences. E. W. Holland says that A. H. Harrison and himself examined the books kept by Isaac E. Bartlett for Huff and Chambers, and made a settlement for them, and deducted the expences from the amount of gold dug, and the rents collected from other persons who had been digging on said lot, it left the sum of three hundred and one dollars, not including the services of William Chambers who superintended the digging on said lot, whose services he thinks was worth three hundred dollars per annum; and the reason the wages of William Chambers was not taken in the settlement was, that Mr. Huff was superintending the digging on another lot; and this made a set off of their own services: the settlement was made in January 1844; they had been digging on said lot more than one year; he derived his information from the books, and he occasionally saw

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them digging on said lot ; he says there was no profits made after deducting Chambers' wages ; he says his means of knowing, was derived from the books kept by Isaac E. Bartlett, and produced to A. H. Harrison and himself for making the settlement between Huff and Chambers, and from seeing them working on the above named lot.

To third interrogatory Isaac E. Bartlett answers : And says that Solomon Morrison never delivered to him any clear gold, but delivered it to him in the sand as it was taken from the pan, and that Morrison never weighed or returned any gold on the books kept by him for Huff and Chambers ; they both answer and say that a person cannot tell with any degree of certainty about the amount of gold, unless it is clear and weighed.

To fourth interrogatory they answer : And say, they have answered this interrogatory in their answer to the second direct interrogatory.

To fifth interrogatory Isaac E. Bartlett says : That Huff and Chambers dug gold on the north-west part of said lot a part of the time that he kept their books, and that Solomon Morrison worked with them ; the said part of the lot belonged to Mr. Jarnagin, and they paid rent to him ; they both say they know of nothing more that would benefit the defendants.

Cross Examined.—To first interrogatory, Isaac E. Bartlett, answers : That the last time he recollects to have seen the books of Huff and Chambers, was in the year 1844, and at the store of Stokely and Bartlett, and in their presence : E. W. Holland says that he does not recollect to have seen the books of Huff and Chambers since A. H. Harrison and himself made a settlement between Huff and Chambers, in or about the month of January, 1844.

To second interrogatory, Isaac E. Bartlett answers : That he was in the employ of L. C. Huff and kept the books of Huff and Chambers, and had charge of the gold dug for them on the south-east part of lot No. 210, 2d district of Carroll ; and

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cleaned and weighed and entered the same on the books; the gold thus dug was delivered to him by Huff and Chambers, and Solomon Morrison; he did not visit the hands often, and he derived his information from being in Huff and Chambers' employ and attending to their gold. E. W. Holland says that, he got his information from the books kept by Isaac E. Bartlett, produced to A. H. Harrison and himself, when they made the settlement between Huff and Chambers, and frequently then at work on the said lot.

To third interrogatory, E. W. Holland answers: That he was on said lot in 1843, and saw Huff and Chambers' hands digging, and saw E. M. Price's hands digging about the same time, and there is more land on the south-east side of said creek; he does not know whether said Huff dug the ground spoken of in the interrogatory or not; he does not know how many hands L. C. Huff worked on said lot.

To fourth interrogatory, they both answer: They have answered that in their former answers.

To fifth interrogatory, E. W. Holland says: That he does not recollect how many lots nor what lots were embraced in the settlement as they made the settlement from the books, as also the expence of digging that lot 210, in the 2d district of Carroll was embraced in said settlement.

To sixth interrogatory, Isaac E. Bartlett answers: That he weighed most of the gold dug by Huff and Chambers on said lot; and it was seldom if ever cleaned and weighed in the presence of the overseer or hands, and when the gold was cleaned and weighed, it was done correctly and entered on the book; E. W. Holland knows nothing of the weight of the gold.

To seventh interrogatory, Isaac E. Bartlett answers: That the memorandum attached to a former set of interrogatories is correct as to the amount of gold dug on lot No. 210, in the 2d district of Carroll, it is the amount dug on the whole lot; not what was dug on the south-east part, but on the whole lot by Huff and Chambers, more than half of the gold mention-

ed in said memorandum, was dug from the south-east part of said lot.

To eighth interrogatory they both answer : That they do not know of anything more that will make in favor of plaintiff.

Isaac E. Bartlett.—To the first interrogatory, he answers : That he knows the parties.

To second interrogatory, he answers : That he knows the precise number of pennyweights and grains from the books of the defendants kept by himself for said defendants.

To third interrogatory, he answers : That he knows the amount of gold dug as stated in a former set of interrogatories by the books of the defendants kept by himself, and that he knows the amount used by William Chambers to-wit : 96 dwts., and the amount paid for goods bought by Huff and Chambers in Charleston, to-wit : 149 dwts. from the entries in the books of the defendants kept by himself ; he knows the gold dug was from lot No. 210, in the second district of Carroll county.

To fourth interrogatory, he answers : That Chambers superintended hands on lot No. 210, in the 2d district of Carroll county, and that Huff attended to hands on lot No. 208, in the 2d district of same county ; they did not all work together, there was three companies employed by defendants ; Huff, Chambers, and Solomon Morrison, attended these companies. He does not know who made the most gold, nor on what lot the most gold was made.

To fifth interrogatory, he answers : That he does not know what the plaintiff was doing ; the defendants were selling goods, and also in buying and selling gold.

To sixth interrogatory, he answers : That he kept the books of Huff and Chambers, the amount of gold dug.

To seventh interrogatory, he answers : That he knows that Huff and Chambers made an effort to settle their partnership in the gold digging, he says he took the memorandum from the books at the request of Huff, which is attached to a for-

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mer set of interrogatories. Huff and Chambers failed to settle, it was in the year 1844, at Villa Rica, in Carroll county, to the best of his recollection. E. W. Holland and A. H. Harrison were then called in to make the settlement. The book showing the amount of gold dug, was shown and presented to the parties that made the settlement.

To eighth interrogatory, he answers: That he cannot state the amount of gold dug on the south-east half of said lot.

To ninth interrogatory, he answers: That since his former set of interrogatories was taken, he recollects that said lot was divided by a line, and that Huff and Chambers dug gold on both halves of said lot. There was a creek running through said lot, and that the bed of the creek was the dividing line for a good portion of the way; he says that the most gold was dug on the south-east half, or he was so informed by Huff; after paying rent of the gold on the south-west half of said lot to Mr. Jarnagin, the balance was placed in with the gold of the defendants, and makes the sum total of the partnership gold. There was gold dug on the dividing line and on both sides of it.

To 11th interrogatory, he answers: That he knows nothing more.

Cross Examined.—To first interrogatory, he answers: That the defendants stated the number of the lot from which the gold was dug, and he has so stated in a former set of interrogatories.

To second interrogatory, he answers: That the creek runs east through two-thirds of said lot, and then runs north-east to the line; and he thinks it does not touch lot No. 211, then enters lot No. 239, where the creek makes the turn north-east the dividing line runs straight through to lot No. 211, which is a dry line from whence it leaves the creek.

To third interrogatory, he answers: That the settlement was made from the statement of the parties, and from the books of the parties kept by him as their clerk, and that he does not know where the books are.

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To fourth interrogatory, he answers: That he does not know anything about Willis Rabun's having sold the south-east half of said lot.

To fifth interrogatory, he answers: That he was at the diggings on said lot, a portion of the time, and a very small portion of the time, at that, and that he knows the lines from the statement of Huff and Chambers and the others, that were interested in said lot, and that he has not seen the lines for a number of years, they were pointed out to him by defendants, Jarnagin, Roberts and others.

To sixth interrogatory, he answers: That he knows nothing more that will benefit the plaintiff.

Edmund W. Holland.—To first interrogatory, he answers: I do.

To second interrogatory, he answers: That he was present at a settlement with defendants; and himself and Abel H. Harrison made the settlement in the year 1844, and the profits of digging gold, not including Chambers' services, was three hundred and one dollars.

To third interrogatory, he answers: That Solomon Morrison was overseer of the hands of William Chambers; was principal boss, and he received the gold dug on south-east half of lot No. 210, from said Morrison; the services of William Chambers was worth about three hundred dollars a year.

To fourth interrogatory he answers: That the profits of digging was so small that the hands were withdrawn from said lot, and defendants dug no more on said south-east half of said lot No. 210, and that he knows nothing more that will benefit defendants.

Cross Examined.—To first interrogatory, he answers: The settlement was made in the year 1844, and was made from an exhibit of the books kept by said defendants of the several amounts of gold dug.

To second interrogatory, he answers: That he did not superintend at any time, but William Chambers was superintendant.

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To third interrogatory he answers: That the price of hands was fourteen dollars a month, including board; the principal part of the hands was furnished by Leonard C. Huff and were mostly black hands.

To fourth interrogatory, he answers: That the digging was mostly on the east part of said half.

To fifth interrogatory, he answers: That neither of the defendants dug on said east half of said lot, but L. C. Huff dug afterwards on the north half of said lot, No. 210, belonging to said N. Jarnagin; both defendants moved off, and Stokely and Bartlett received rents under the direction of A. H. Harrison & Co. and the toll was one-eighth of the amount dug; what rents were received before the settlement was included in said settlement; as to who dug as renters on said lot, he does not know.

To sixth interrogatory, he answers: That he knows nothing more that will benefit the claimant.

The cause being closed, counsel for the defendants requested the Court to charge the jury.

1st. That if the plaintiff is entitled to recover anything, he is not entitled to interest.

2d. That the statute of limitations commence to run against the plaintiff whenever he could have instituted suit against the defendants, and that he could have sued the defendants when they quit their joint work, and if he failed to bring his suit within four years from the time they ceased their joint work on said lot, then his right to recover is barred and he can recover nothing.

3d. That the bill being filed against Huff and Chambers for joint work, and no charge being made in it against Huff alone, since he and Chambers ceased their joint operations on said lot, then plaintiff can recover nothing against Huff alone.

All of which, the Court refused to charge, and counsel

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for the defendants excepted; and the Court charged the jury as follows:

1st. That if the complainant is entitled to recover anything, he is entitled to interest from the time when defendants converted the gold bullion into money, and thereby appropriated it to their own use.

2d. That the parties having, as the Court understood them, while conducting the evidence before the jury, admitted themselves to be tenants in common and the Court regarding them as such, the complainant's right of action did not accrue until defendants disavowed complainant's right and he had notice of that fact, and that the statute of limitations did not commence to run till complainant's right of action had accrued.

3d. That the bill being filed against the defendants jointly, and severally, complainant had a right to recover of them jointly for his proportion of the gold dug by them jointly from the part of the lot to which he has shown title, and of half separately for his proportion of the gold dug by them separately after deducting all expenses of procuring the gold in each case. And counsel for the defendants excepted.

The jury returned a verdict for the plaintiff for the sum of three thousand and thirty-five dollars and twelve cents, with costs of suit, against Huff and Chambers, and the sum of two hundred and seven dollars and seventeen cents, with cost of suit, against Huff.

And counsel for the defendants during the Term of said Court, moved for a new trial, on the following grounds, to-wit:

1st. Because the Court refused to charge the jury as requested by defendant's counsel.

2d. Because the Court overruled the demurrer to that part of the bill which seeks to recover damages for trespasses

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committed on said lot of land, prior to complainant's purchase, and which were assigned to him by Atkinson.

3d. Because the Court allowed said assignment to be introduced as evidence, and to be read to the jury.

4th. Because the Court permitted the deed of conveyance from Myers the assignee in bankruptcy to be read in evidence to the jury, without any order, decree or judgment of the Court being produced or shown, authorizing the sale of the land conveyed by said deed.

5th. Because the verdict of the jury is against evidence, and the weight of evidence.

All of which grounds were overruled by the Court and a new trial refused.

And defendant's counsel excepted.

W. AKIN, for plaintiffs in error.

J. W. H. UNDERWOOD, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The first two grounds of the demurrer were not insisted on.

The third, and only remaining ground, had been obviated by an amendment to the bill; an amendment by which the administrator of Atkinson had become a complainant in the bill.

The objection to the admission in evidence, of the assignment made by Atkinson, was also obviated by this same amendment.

The first question, therefore is, upon the refusal of the Court, to charge as requested.

The first request was this; "That if the plaintiff is entitled to recover anything, he is not entitled to recover interest." Was the Court's refusal of this request right?

The plaintiff and defendants were tenants in common; tenants in common of a piece of land containing a gold

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mine. The defendants alone worked the mine. They received from it a quantity of gold. This gold they used, delivering no part of it to the plaintiffs.

By the 27th section of the Act of the 4th of Anne, "for the amendment of the law and the advancement of justice," it is amongst other things declared, that "actions of account may be brought" "by one joint tenant, and tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant, or tenant in common." *Schley's Dig.* 330.

If, therefore, one tenant in common, receives more than his just share, he is to hold the surplus above his share, *as bailiff*, for the other tenant in common, and is as bailiff to account for such surplus to that tenant. This seems to be the meaning of the statute.

Is a *bailiff* liable to the payment of interest?

"Bailiff or receiver to any man, &c. By this, &c., many things are implied, as that by bailiff is understood, a servant that hath administration and charge of lands, goods and chattels, to make the best benefit for the owner, against whom an action of account doth lie for the profits which he hath raised or made, or might, by his industry or care, have reasonably raised or made, his reasonable charges and expenses deducted." *Co. Litt.* 172, a

From this, it follows, that a bailiff is bound to pay his principal at least the *actual profits*, which he has made out of the property which he holds as bailiff.

A tenant in common, who receives more than his share of the profits of the common property, holds the surplus as bailiff for his co-tenant, who, therefore, stands to him as his principal. He, consequently, is bound to pay his co-tenant the actual profits which he has made out of such surplus, as well as the surplus itself. See *Docker vs. Somes*, 2 *Myl. & K.* ; 655, *Stor. Eq.* 465, 445.

Gold of the purity of that taken from this mine is, for all

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practical purposes, equivalent to money. The gold, therefore, received by the tenants, Huff and Chambers, may be treated as so much money.

Now the law by saying that a particular rate of interest shall be paid for the use of money, says, in effect, that profits arise from the use of money, and that these profits are to be deemed equal, not only to the interest on the money at that rate, but to such interest plus another sum sufficient to pay the person using the money, for his risk, care, trouble and expense, in using the money.

The tenants, Huff and Chambers, had the use of the surplus gold, if any, which they received from the mine. They admit that they used all the gold which they received from the mine.

It follows, that it is necessary to presume, in the absence of proof to the contrary, that they made profits on this surplus gold, and that those profits were *at least* equal to what would have been the interest on that gold, considering the gold as so much money.

Now what they were bound to account for was, as we have seen, this surplus gold, and the actual profits which they made on it.

What the Court told the jury they were bound to account for, was, the surplus gold and the *interest* on it. This was in effect, merely making interest on the gold the *measure* of the profits made on the gold.

Interest, as we have seen, is really in the eye of the law, an *inadequate* measure of the profits of gold or money.

What the Court told the jury therefore, was at least as favorable to them, that is, the tenants, Huff and Chambers, as they had any right to expect.

[1.] The effect of the charge being, then, merely that the jury might consider interest as the *measure* of profits, and the charge being made in a case in which, by the absence of all proof as to what were the actual profits, there was no

other measure of profits, the charge was free from error, at least, so far as Huff and Chambers were concerned.

It follows too, that if the requested charge had been given without explanation, it might have misled the jury. And therefore the Court was not bound to give it.

There is nothing in this conclusion adverse to anything contained in the 28th section of the Judiciary Act of 1799; a section which is as follows: "No verdict shall be received on any unliquidated demand where the jury have increased their verdict on account of interest, nor shall interest be given on any open account, in the nature of damages."

It was never supposed that there was anything in this section to prevent a *cestui que trust* from recovering from his trustee the *actual profits*, no odds how great, made by the trustee out of the trust property. Executors and administrators have had to account for the actual profits made by them out of the assets in their hands, be those profits as high as they might, just in the same way, and to the same extent, since the passage of the act containing this section as before its passage. And so it has been with all other like trustees. And a bailiff is, as we have seen, a servant or trustee like to these.

The next question relates to the statute of limitations and grows out of the charge on that subject refused, and the charge on that subject given.

At what time did the statute of limitations commence running against the plaintiffs?

The defendants Huff and Chambers, as we have seen, received and held the surplus gold as *bailiffs* for the plaintiffs; as bailiffs having the "administration and charge" of the gold for the "benefit" of the plaintiffs. In other words, the defendants were trustees of the gold for the plaintiffs; trustees entitled, at least, to the right, if not subject to the duty of administering, i. e. managing and using the gold for the benefit of the plaintiffs.

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This being so, there was the same sort of relation between them and the plaintiffs, that there is between an executor and the legatees, an administrator and the next of kin, a guardian and the ward. But the relation between these is such, that it prevents the statute of limitations from running until the executor, the administrator, or the guardian, as the case may be, has begun to hold adversely to his correlative, and knowledge of that fact has come to the correlative.

[2.] It follows, that the relation between these plaintiffs of the one part and the defendants of the other, was such as to prevent the statute from beginning to run in favor of the latter against the former, until the latter began to hold the gold adversely to the former, and knowledge of that fact came to the former.

It is true, that in a case in the *4th of Iredell's Eq. Rep.* 1, the Court comes to a different conclusion; but the Court cites no authority for its opinion, and besides, seems not to have adverted to this peculiarity of the relation which, under the statute of Anne, exists between the tenant in common, receiving more than his just share, and his co-tenant.

We think, then, that the Court below committed no error with regard to the statute of limitations.

The bill prays for an account against the defendants separately, as well as jointly.

The Court was right therefore, in refusing the third charge requested, and in giving the third charge given.

The evidence was conflicting; but we think, that there was at least as much in favor of the verdict, as against it.

The result is, that the exceptions must all be overruled, and the decisions excepted to, be affirmed.

Judgment affirmed

No. 36.—JOHN PINKERTON, plaintiff in error, vs. WILLIAM TUMLIN, and others, defendants in error.

Under the exempting acts, it is only in cases in which the head of the family owns a *greater quantity* of land, than that exempted from levy and sale, that any land is required to be laid off with notice to the Sheriff, &c. In cases in which the quantity is less, the whole is exempt; and the Sheriff can sell none of it.

In Equity, from Cass Superior Court. Decision by Judge TRIPPE, July 1856.

Bill for injunction, filed by John Pinkerton, against E. A. Brown, William Tumlin, and Christopher Dodd, defendants.

Complainant alleges that for a number of years he has been the owner and in possession of two lots of land in the county of Cass, to-wit: Nos. 699 and 700, each containing forty acres of the value of not more than two hundred dollars. That the Sheriff of Cass county, under and by virtue of a *fi. fa.* issued against complainant at the suit of Enoch B. Pressley, levied on said land and advertised the same to be sold on the first Tuesday in March 1855; that before the sale, complainant procured the county surveyor to survey and lay off from said lots fifty acres, including the dwelling house of complainant, which were valued by a Justice of the Peace and one other person, at an amount not exceeding two hundred dollars. Pressley was notified to select some person to assist in said valuation, which he declined to do. Said survey was made on the 6th day of March, 1855, and before said land was offered for sale, returned to the Sheriff, together with a notice by complainant of the boundaries of said fifty acres claimed by him as exempt from levy and sale, under and by virtue of the statute in such case made and provided; said sale was not made as advertised, after the service of said survey and notice upon the Sheriff. Said land was afterwards advertised and sold at a postponed sale on the first Tuesday in August, 1855, to William Tumlin, at and for the

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sum of two hundred dollars, together with other lands adjoining, and to which complainant had no claim; said land was worth fifteen hundred dollars, but the small amount for which it sold, was owing to its exemption as aforesaid; that Christopher Dodd and the Sheriff were interested in the said sale thus illegally made.

The bill also states that the complainant is an ignorant man, and that in having the survey made and notice given, as aforesaid, he acted without the aid of counsel, and that although he had six children under the age of fifteen years, he thought that he was entitled to the exemption of only fifty acres, and therefore it was that he had the survey made as aforesaid; that he has six children under the age of fifteen years.

The bill prays that said Tumlin, Dodd, and Brown be enjoined from dispossessing complainant, and that the said fifty acres of land be decreed to vest in the wife and children of complainant, free from levy and sale for the debts of complainant.

Defendants, Tumlin and Dodd, by their answer admit the possession of complainant of the land in controversy, and the levy and sale thereof by the Sheriff, but they deny that the same was ever surveyed or valued, or that Pressley or they ever had any notice thereof, and they aver that the house and improvements are worth four hundred dollars.

They have been informed since the filing of the bill, that the county surveyor did show to the Sheriff a survey of the fifty acres, on the 1st Tuesday in March, 1855, and the sale was postponed, not in consequence of said survey, but because said Pressley directed him, by letter brought to him by complainant, to postpone the sale, and complainant promised to pay the debt in three or four months. They deny that Brown, the Sheriff, had any interest or ever did have any in said sale, but admit that they were united in the purchase, and that the reason said land sold for only two hundred dol-

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lars was, because of the doubt and distrust entertained in relation to the title of complainant.

Upon hearing the bill and answer, the Judge, on motion, dissolved the injunction and complainant excepts, and assigns error thereon.

WOFFORD, for plaintiff in error.

AKIN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Ought the Court below to have dissolved this injunction ?

Not if the plaintiff was entitled to have the Sheriff's sale set aside, and the Sheriff's deed delivered up to be cancelled. Was the plaintiff entitled to this relief ?

We think so, taking the bill to be true ; and we have to take the bill to be true, as most of its important allegations are, either not denied at all by the answer, or are denied only on hearsay and belief.

Taking the bill to be true, the plaintiff had six children under fifteen years of age ; and he owned eighty acres of land ; such land as might by the exempting acts of 1841 and 1843, be exempt from sale for the plaintiff's debts.

If all this is true, the land *was* exempt from sale for the plaintiff's debts, for the exempting Act of 1841, says : "That every white citizen of this State, male or female, being the head of a family, shall be entitled to own, hold and possess, *free and exempt* from levy and sale by virtue of any judgment," &c., "twenty acres of land, and the additional sum of five acres for each of his or her children under the age of fifteen."

And the Act of 1843, amendatory of this, raises the twenty acres of this to fifty, but does not affect this, as to the five acre parcels. *Cobb's Dig.* 389, 390.

The plaintiff having six children, and no part of the eighty acres being such as falls within any of the exceptions of

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these statutes, the *whole* of the eighty acres was *free and exempt* from levy and sale under any judgment against him. This is what the statutes themselves, in so many words, say.

A Sheriff can have no authority to sell under a judgment, what is by law specifically exempted from sale under that judgment by him.

Therefore, this Sheriff could have had no authority to sell this eighty acres of land. But he did sell it. Therefore, the sale ought to be set aside, and the deed made by him cancelled.

This is the relief to which the plaintiff is entitled. No other relief is adequate. Manifestly, a suit against the Sheriff for a trespass and damages, would be a poor compensation for the loss of home, to a man with a wife and six children, the oldest not fifteen.

The part of the exemption Act of 1841, that requires a survey, &c. to be made of the lot that is to be exempt from sale, applies not to such a case as the present, but to cases in which, the "head of the family" owns "a greater quantity of land than that exempted from levy and sale" by the part of the Act already referred to.

We think therefore, that the Court erred in dissolving the injunction.

Judgment reversed.

NO. 37.—BENJAMIN CAMERON, BENJAMIN D. JOHNSON and WILLIAM A. SPEAR, plaintiffs in error vs. STEPHEN WARD, defendant in error.

[1.] The bill of exceptions must show that the decisions complained of as erroneous, were actually made by the Court, and the only proof of the fact is the Judge's certificate.

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- [2.] The presumption is that the judgments of the Superior Courts are right, and the onus is upon the plaintiff in error, to make it appear otherwise.
- [3.] When the fact appears only in a *rule nisi* for a new trial, that the Court refused to charge as requested, and the rule is disallowed by the Court, without stating the grounds, it is no evidence of the fact thus assumed, especially when the judge, in the bill of exceptions, certifies that he gave the charge recited in the motion, but is silent as to his refusal to charge.
- [4.] When C. & J. advance money to C. to pay for land bought of him by W. and take the title to themselves, to secure the re-payment of the sum thus advanced, and a time is stipulated for the re-payment, with the stipulation that, on default of W., the land may be sold to reimburse the lenders, it is sufficient if W. tender the money at any time before the land is sold and paid for, especially if the purchaser know of the pre-existing equities between the parties.
- [5.] Whether an agent be drunk or sober, in the opinion of witnesses, still, if he execute with fidelity and skill the business entrusted to him, and his principal does not complain, it is not competent for the other party, with whom he deals, to do so.

In Equity, from Troup Superior Court. Tried before Judge HAMMOND, November Term, 1856.

This was a bill filed by Stephen Ward, the defendant in error, against Benjamin Cameron and Benj. D. Johnson and William A. Spear, plaintiffs in error. The bill alleges that complainant, in the year 1835, bought lot of land No. 2, in the 11th district of Troup county, at the price of \$750 from one Thomas Walker; that Walker had purchased it from the drawer in the year 1832; that complainant, immediately after his purchase, went into possession, made valuable improvements, and continued in possession until the latter part of the year 1847. Sometime in this year (1847,) complainant learned that said lot of land had been recently granted to one John J. Whitaker, by reason of the same not having been previously granted, and that said Whitaker had sold the same to Compton, the Surveyor General: That complainant went on to Milledgeville in November, 1847, to ascertain fully the condition of the title, and if possible to secure his land, without the expence of a law suit; that it was during the session of the Legislature, and he conversed and advised fully with Cameron and Johnson---the former a rep-

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representative from the county of Troup, and the latter the Senator from Troup and Heard,—about the situation of the title; that Compton agreed that if complainant would pay him \$200, he would make him a deed to the land, and thus at once and forever end the controversy. Complainant not having the money with him, communicated the facts to his friends Cameron and Johnson, who agreed to let him have the money, or to pay it for him, and take the title from Compton to themselves, and that upon their return home from Milledgeville and the re-payment of the money to them by complainant, they would convey said land to him. This arrangement was effected and, without reducing said agreement to writing, Cameron and Johnson paid the said sum of \$200 and received a deed for said lot to themselves, and in their own names. Complainant finding that he had some money to spare, paid them the sum of twenty dollars, and agreed to refund the balance, being \$180, with interest thereon, in a short time after their return from Milledgeville, which it was thought would be about Christmas; that desiring to comply promptly with his contract, and not wishing to disappoint his friends, he borrowed the money before Christmas and sent it by a friend to Cameron, but he not having returned from Milledgeville, the same was not paid to him; that shortly afterwards complainant was taken sick and wrote to Cameron informing him of his illness, and that he would bring or send the money in a very short time; that continuing unwell, about the 1st of February, 1848, and not more than a month after their return from Milledgeville, he sent the money to them by one Archibald Wilkerson, who went to Cameron and advised him that he had brought from complainant the money to pay him the amount advanced for the land; when said Cameron informed him that Johnson had sold the land to William A. Spear, and that consequently he could not receive the money nor execute a deed to complainant for the land; that said Wilkerson also called on Johnson and tendered him the amount advanced with interest, which

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Johnson likewise refused to receive, and acknowledged that it was out of his power to convey the land to Ward, he having sold and conveyed the same to William A. Spear; that complainant, when informed of the conduct of said defendants, was reluctant to believe that men enjoying so much of the public confidence and professing so much friendship for him, would forfeit their plighted faith, and went himself to see them upon the subject; that said defendants refused to come to any terms or make any arrangement by which complainant could save his land, worth a thousand dollars, or to pay him for the same. The bill prays for such relief as the nature and circumstances of the case required, and especially, that Cameron and Johnson be decreed to pay him the sum of one thousand dollars, the value of said land, with interest thereon from 1st January, 1848.

Defendants Cameron and Johnson demurred to the bill for want of equity, which was overruled by the Court.

They then filed their separate answers and admit that the facts relating to complainant's visit to Milledgeville, and his negotiation and trade with Compton, and their advancing the sum of \$200 for him, as stated in the bill, are true; but they deny having received the twenty dollars alleged to have been paid to them, and they set up and insist that the said sum of two hundred dollars, advanced by them, was to be repaid to them on their return home about Christmas, and in the event that this was not promptly done, they were to sell the land and thus at once realize the sum paid out by them; that having waited sometime on complainant after their return from Milledgeville, and not hearing from him, and needing very much the money which they had advanced, that they did sell the land to said Spear for three hundred dollars, which was the best price, under the circumstances, that they could get, and that they had offered to complainant the surplus of said sale, being one hundred dollars, in a note on said Spear, who was perfectly good, and which he refused; that they acted in the matter entirely at complain-

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ant's instance and persuasion, and the *time* for the payment of the money having expired, they felt themselves under no obligation to extend indulgence, and retain the land for his benefit. They deny that any tender of the money was ever made—they admit that Wilkerson did call to see them, after the land was sold to Spear, and said something about his having the money to pay them for the land; but Johnson in his answer states that Wilkerson called upon him, and that he was so drunk that he was unfit to attend to business, and that he told him to go off and get sober and he would see him again, and try and make some arrangement about it.

They insist also upon the statute of frauds.

Spear was made a party by an amendment to the bill, who answered, that about the first week in January 1848, he heard that Johnson was offering the land for sale, and being desirous of purchasing the lot, he saw Johnson and agreed to buy it, if he could get a good title; that about the 26th day of January, 1848, he bought said lot of land from Johnson for the sum of three hundred dollars; he most positively denies that, at the time of his purchase or before, either Johnson or Cameron had informed him of the facts charged in complainant's bill; after the trade was made, Johnson told him that he had sold the land to reimburse himself for the money paid for Ward in Milledgeville.

Under the charge of the Court and the testimony adduced on both sides, the jury found for complainant six hundred and fifty-three dollars and thirty-six cents, (\$653 36.)

Defendants made a motion for a new trial on the following grounds, to-wit:

1st. Because the Court erred in refusing to charge the jury as requested by defendants' solicitor, that in order to prevent the operation of the statute of frauds, it was necessary that they should believe from the evidence, that the defendants were guilty of a fraud or acted fraudulently in the transaction set forth in complainant's bill, and that the con-

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tract is not such a contract for the sale of land as the statute contemplates.

2d. Because the Court erred in charging the jury that it was competent for a person to select any person he thought proper to act as his agent, so he was not insane or a lunatic.

3d. Because the Court erred in charging the jury that although they should believe, in this case, that *time* was of the *essence* of the contract, yet, if Ward tendered the money to defendants before the land was sold, or within a reasonable time, they were bound to reconvey to complainant, or refund in damages, although the time agreed on by the parties for the payment of the money had elapsed.

4th. Because the Court erred in charging the jury that if *time* was of the *essence* of the contract, it was incumbent on the party insisting on it to prove the time.

5th. Because the Court erred in rejecting the following words of the witness, Spencer J. James in his answer to the third interrogatory, to-wit: "That he was not capable of transacting any kind of business." Also, in rejecting the following words in the answer of James Askew to the second interrogatory: "Made no tender of it, or any portion of it, to the said B. D. Johnson." Also in rejecting the following words in the same answer, to-wit: "too much so to transact any kind of business."

6th. Because the decree made by the jury is contrary to law, the charge of the Court and the testimony.

The Court refused the motion for a new trial, and defendants excepted.

OVERBY & BLAKELY; and DOUGHERTY, for plaintiffs in error.

B. H. HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

A motion was made to dismiss this case, for want of a bill of exceptions.

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By the 9th and last section of the Act of 1856, it is provided that the case shall be heard upon the errors as set forth in the bill of exceptions, which shall be plainly and distinctly stated. *Pamphlet Acts*, p. 201. To give to the late statute the utmost latitude of construction, we take it, that the bill of exceptions must show that the decisions complained of as erroneous, were made by the Court, and that the only proof of this fact is the Judge's certificate to this effect. In other words, it is incumbent on the plaintiff in error to make it appear affirmatively that the judgment of which he complains, was erroneous—and that, failing in this, the judgment will be affirmed. The presumption is, that the judgment is right.

In this case there was a motion for a new trial; but the *rule nisi* was overruled. The motion was predicated upon six grounds.

1st. Because the Court erred in refusing to charge the jury as requested by defendants' solicitor—which request is set forth in full.

2d. 3d. 4th. In charging the jury as therein set forth.

5th. In rejecting certain portions of the testimony of the witnesses Spencer J. James and James Askew.

6th. Because the decree of the jury was contrary to law and evidence and the charge of the Court.

A brief of the testimony, as agreed upon by counsel, accompanied the application for a new trial.

Now, the presiding Judge, in his certificate, adopts this brief of the testimony, annexed to the *rule nisi*, for a new trial, as a part of the bill of exceptions. And by a fair interpretation, we hold, that he intended thereby to say, that it contains all the evidence material to a clear understanding of the errors complained of. He also certifies that he gave the charges as set forth and stated in the motion for a new trial. But he no where states or admits that he refused to give the charge requested by the defendants' solicitor, or rejected any part of the proof offered on the trial.

Can this Court then hear and determine the errors com-

plained of in these two particulars? We think not, most manifestly. And this is no technical objection. It is fundamental and vital. Suppose we were to reverse the judgment below, because the Circuit Judge had refused to charge as requested, or had ruled out a portion of the testimony of James and Askew?—might he not—might not the complainant in the Court below justly complain that we had overruled the Judge upon a matter which never transpired in the case? It may be replied, that these grounds were taken in the *rule nisi* for a new trial. True, but the Court refused to entertain this motion; and it may be, (for he does not give the reasons for his judgment,) because these very grounds were wrongfully inserted, and not true in point of fact. One thing is certain, that while the Judge adopts the brief of evidence as a part of the bill of exceptions, and certifies, expressly, that he gave the charges as set forth in the motion for a new trial, he is silent as to the complaint, that he refused to charge. And the maxim *expressio unius est exclusio alterius*, would seem to apply.

With the strong desire ever manifested by this Court, to hear cases upon their merits, and with an honest purpose to execute the laws of the Legislature, in the spirit in which they were enacted, we are compelled to restrict this bill of exceptions to the legality of the instructions given to the jury, and to the finding of the jury upon the proof, as contained in the record.

What are the facts of this case? Stephen Ward, the complainant in the bill, had purchased the lot of land in dispute, in 1835, of one Thomas Walker, for \$750; that he went into immediate possession, and so continued until the latter part of 1847; that in 1835, upon inquiring of the Surveyor General, he was informed that the grant had been issued before the purchase by Walker, his grantor, of Christian Thomas, the previous owner; that not doubting but that the grant had issued from the State, he made valuable improvements upon the land; that in 1847, to his surprise, he learned that

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the lot was not granted when he purchased of Walker, but had been granted to one Thomas Whitaker, under the then late law, and sold by him to Pleasant Compton ; that in November, 1847, he went to Milledgeville, when Compton, under the peculiar circumstances of the case, agreed to let him have the lot for \$200. That Cameron and Johnson being there as members of the Legislature, and his immediate Representatives, in whom he had entire confidence, advised him to pay the \$200, and save his homestead ; lacking the money, they agreed to advance it ; and for their security, to take the titles in their own names, which they agreed to re-convey to him, upon being refunded their money with interest, when they returned home from Milledgeville ; that having that much more money than he needed to defray his expenses, he handed them \$20.

About the last of December, 1847, expecting that Cameron and Johnson had returned from the Legislature, Ward borrowed the money and sent it by a friend to Cameron ; but he had not got back. That shortly after, he was taken sick ; but about the first of February, 1848, he procured the money to be again carried to Cameron, who informed the messenger, A. Wilkinson, that Johnson had sold the land to one William A. Spear. It seems that this sale was unknown to Cameron, at the time it was made ; that he expressed himself dissatisfied with it, and insisted that Ward should have the land ; *Spear's note was given in payment* ; and Cameron never signed the deed until the month of November following—long after suit had been instituted to enforce the specific performance of the contract. Cameron not only refused to unite at that time in the conveyance to Spear, but said it must be rescinded, and appealed to Johnson to that effect. Spear admitted to Stamps, before he purchased the land, that he knew of the agreement between Ward, Cameron and Johnson, and that he was to have the land, provided it was not redeemed by Ward. It is not pretended but that the only lien the defendants had on the land, was to sell and re-

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imburse themselves for the money advanced to Compton for and on account of Ward. The testimony of Garhey and others, puts this point beyond dispute.

What then is the law of this case? It is wholly immaterial whether time was of the essence of the contract between the parties or not, if Ward, before the land was sold and paid for, tendered to Cameron and Johnson the \$180, paid out for him, with the interest thereon; they were bound to receive it, and re-convey the title to him. And the proof is clear and conclusive that this was done. When Wilkinson called on Cameron with the money, and demanded a deed, Cameron was ignorant of the inchoate and incomplete contract between Johnson and Spear; Spear had full notice of Ward's equity before he paid out his money—indeed, he knew of it before he and Johnson rushed with such suspicious haste into the trade. Why did he not retract? Had the sale been consummated, and a joint deed executed, his conscience, we apprehend, would be affected by the pre-existing equity between Ward and his vendors. Such, however, is not his position. His bargain was unfinished when the re-payment was tendered, and consequently the trust deed, under which he was taking his title was *functus officio* and spent.

It is quite unnecessary, therefore, to enter into a critical examination of the charges complained of. This broad view overrides them all, and settles the rights of the parties upon the stable foundations of justice and good faith.

We see nothing in the verdict contrary to law or evidence, or the charge of the Court. It is in accordance both with the facts and the law, and should not be disturbed.

As to the instruction of the Court respecting the capacity of the agent, we see nothing to object to. He seems, drunk or sober, to have understood and executed with skill and fidelity, the business intrusted to his care. And as his principal does not repudiate his acts, there is no reason why the other parties should.

Judgment affirmed.

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No. 38.—**NANCY CORLEY**, (by her next friend,) plaintiff in error, *vs.* **AUSTIN W. CORLEY**, and others, defendants in error.

Where slaves are given by A in trust for the support and maintenance of his daughter and her children, during the lifetime of the daughter, and at her death, the negroes and their increase to be equally divided between the children of the daughter; and upon the death of the trustee, the property is taken possession of by the daughter, who permits each of her children as they marry or come of age, to take away one, two or three of said slaves:

Held, [1.] That a receipt by the husband of one of the girls, for three negroes, specifying, that they were received as his and his wife's share of the donor's estate, was not such a reduction to possession of his wife's share of the negroes, as to defeat her equity to a settlement out of the property thus given by her grand father.

[2.] That as the husband or his creditors, or the purchasers of his interest in and to this property, would have to go into equity to effect a distribution of the property, a Court of Equity would interfere and restrain, by injunction, the proceedings, until a suitable provision was made for the wife and children.

In Equity, from Meriwether Superior Court. Decision on demurrer by Judge BULL, at February Term 1857.

This was a bill filed by Nancy Corley, wife of Austin W. Corley, by her next friend, against said Austin W., her husband, John Jones, and other judgment creditors of the said Austin W. Corley.

The bill alleges that John Arledge and Ann Arledge, the grand-parents of complainant, residing in Edgefield District, South Carolina, conveyed by deed of trust, dated the third day of December, 1816, to one Mark Mathis, three negro slaves, to be held by him for the maintenance and support of Esther Weeks, their daughter, and her children, for and during her life, and at her death, said negroes and their increase to be equally divided amongst said Esther Week's children, which she then had, or may have, at the time of her death, and if at any time said trustee should refuse said maintenance and support, said slaves to revert to the donors or their heirs. Under and by virtue of said deed, the slaves

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went into the possession of said Mathis, who took upon himself the execution of the trust. About four years thereafter, Mathis died, and no one being appointed or substituted in his place, said Esther took possession and control of said slaves and continued to hold the same until about 1826. At this time, her oldest daughter intermarried, and she permitted her husband to take into his possession two of the said negroes. In 1828, another daughter married, and she permitted her husband to take *one* of said negroes into possession; and thus she continued to permit each one of her children, as they became of age or married, to take into their possession one or two and sometimes three of said slaves.

Mrs. Corley the complainant, and who was one of the children of said Esther Weeks intermarried with Austin W. Corley, in the year 1830, and about two years thereafter removed to the State of Georgia; and afterwards, when on a visit to South Carolina, about the year 1834, for the first time, said Esther permitted her husband to take into possession and bring with them to their home, in Georgia, three of said negroes, and he gave to said Esther a receipt for the same, specifying that they were received as their share of John and Ann Arledge's estate.

The bill further alleges that said slaves have increased to more than forty, and are in the possession of the children of said Esther, obtained by them as aforesaid, and of the aggregate value of about \$28,000. That said Esther had seven children, who are residing at this time in the States of South Carolina, Georgia and Alabama.

The bill sets out the number and value of the slaves in possession of each child. Some having as many as nine or ten and others but one or two, and so on. That complainant and her husband have in possession nine of said slaves, worth about \$4,400: That said slaves have been levied upon by the Sheriff of said county, under and by virtue of various judgments and *fi. fas.* against said Austin W. Corley her husband, and removed and taken out of the possession of

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said complainant and her husband by said Sheriff. That upon the application of complainant, Levi M. Adams was appointed, by the Superior Court of said county, trustee, who interposed a claim to said slaves, and upon complying with the terms of the statutes in such cases provided, took said slaves into his possession where they have since remained. That said claims are still pending and undecided. That in October, 1856, (said claim still pending,) the said Esther Weeks departed this life, in Edgefield District, South Carolina, and that no division or partition of said slaves was made amongst the children of said Esther during her life, nor has any been made since her death.

That complainant has eight children, five of whom are so young as to be unable to support themselves; that said nine negroes, consist of two women and children worth not more than \$100 per annum; that she has no other means of support, except that to be derived from the use and services of said slaves, and that her husband is hopelessly insolvent.

The bill prays for a distribution of all the slaves, both in and out of the State, or for a distribution of the slaves in this State; for a settlement of the share or estate due and belonging to complainant, under and by virtue of said trust deed, upon herself and children, free from the debts or contracts now or hereafter existing against, or made by, her husband, and from the lien or claims of the said judgment; for injunction, &c.

To this bill the judgment creditors of Austin W. Corley, defendants, filed a demurrer, which the Court sustained and dismissed the bill.

To which decision plaintiff's counsel excepts, and assigns error thereon.

HALL, DOUGHERTY and WARNER, for plaintiffs in error.

B. H. HILL, and McMATH, for defendants in error.

By the Court.—LUMPKIN J. delivering the opinion

[1.] Had Austin W. Corley, the husband of Nancy Corley, the complainant in the bill, so reduced to possession his wife's share of the negroes deeded to her by her grand parents, John and Ann Arledge in 1816, as to defeat her equity to a settlement out of said property? For we hold, that if, before any proceedings be instituted in relation to the slaves, they had been transferred to the husband by the person entitled to the custody of the same—as it lawfully may be—the transfer will be good; and it is afterwards too late to apply to a Court of equity for its interposition for a settlement on the wife and children.

What are the facts? The negroes were conveyed in trust to Mark Mathis, to be held by him for the maintenance and support of Esther Weeks, their daughter, and her children, for and during her natural life; and at her death, said slaves and their increase, to be equally divided between said Esther Weeks' children, which she then had or might have at the time of her death. Mathis the trustee, lived about four years and died, and no one was appointed in his place. The slaves and their increase were taken possession of by Esther Weeks, and held and controlled by her until 1826, when her oldest daughter intermarried, and she permitted her husband to take off two of the negroes. In 1828, another daughter married, and she allowed her husband to carry off *one* of said negroes; and thus she permitted each one of her children as they severally came of age or married, to take one or two and sometimes three of said slaves.

Mrs. Corley, the complainant, who was one of said children, intermarried with Austin W. Corley in 1830; and in 1832, removed to the State of Georgia.

In 1834, when on a visit to South Carolina, her mother suffered her husband to bring with him to Georgia three of said slaves, for which he gave a receipt to the said Esther,

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specifying that they were received as his and his wife's share of John Arledge's estate. Esther Weeks died in 1856. Whether each of the other children executed a similar instrument, or any at all, does not appear. Neither is it shown whether the portions thus allotted off were of equal or unequal value, or what became of the property left with Esther Weeks after the termination of her life estate.

The position occupied by the learned counsel for the creditors is, that notwithstanding the division thus made had no binding force until the whole of the children had severally ratified it; yet when the last child received his share, the implied consent of the whole was given thereto, and the distribution was complete. But this assumes that every child received an equal portion, or at any rate, a share with which he was satisfied, and granted an acquittance similar to that given by Corley, and that too in the face of the positive allegation in the bill, which is admitted by the demurrer to be true, that neither before nor since the death of Esther Weeks has there been any distribution of the negroes.

But we apprehend there is another stubborn difficulty in the way. To make this transaction such a reduction to possession of this property by the husband, as will cut off and defeat the wife's equity, it must amount to a relinquishment by each of the remainder-men to all the rest of any other or further interest in and to the property, including necessarily the wife's equity to a settlement, and this she has never given. It is true, she may voluntarily part with this right, but the husband cannot convey it without her consent. By the terms of the deed, there was not to be a division of the property until the death of Esther Weeks. Adams was appointed trustee, by order of the Judge under the Act of 1853, in lieu of Mark Mathis deceased, before the death of Esther Weeks, and had in his possession as such trustee, at the time of her death, the nine negroes in controversy. By order of the Judge, acting as chancellor, the legal title to the negroes

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was assigned to Adams the trustee, who held them in trust, for the use, behoof and benefit of Mrs. Corley, according to the terms and conditions of the original deed, as fully and completely as Mark Mathis, had he continued in life. *Hill on Trustees* 41, 45, 48, 211.

We repeat, therefore, that it was not competent for the husband, in 1834, to execute such an assignment, upon the receipt of a part of the property, as would defeat the wife's equity; she not of her own accord joining therein with him. The receipt given by Corley must be construed to extend only to such an interest as the tenant for life had in the property. It was only a receipt for the *use* of a portion of the property during Esther Week's life, and not for the *corpus*. To this Corley was entitled: and a Court of equity would not only have sanctioned, but coerced by its decree, just such an arrangement, without interfering at all with the wife's equity.

[2.] Could Corley himself, or his creditors, or the purchasers of his interest in this property, which is the surplus, if any, after a suitable settlement is made for the wife of this insolvent and her eight children, effect a division of the negroes without resorting to a Court of equity? We know of no mode *at law* of partitioning this property, and counsel have suggested none. That being the case, equity will interfere and restrain, by injunction, the sale of this property at the instance of the husband's creditors, until a suitable provision is made. *Kensley vs. Udal*, 5 *Jokns. Ch. Rep.* 494.

Judgment reversed.

No 39.—**JAMES C. FREEMAN**, plaintiff in error, *vs.* **DAVID S. CAMPBELL**, defendant in attachment, and **GREENVILLE MASONIC LODGE**, garnishee, defendants in error.

A. stipulated with **B.**, that **B.** should build him a house for \$2,650, payable in five installments: \$500 when the house should be framed and raised; \$500 when the house should be enclosed and roofed; \$500 when the floors should be laid and the partitions set; \$500 when the ceiling should be put up, and all the carpenter's work done; \$650 when the painting should be done, and the keys delivered.

Held, that by this stipulation, what **B.** was to do, was but a single job of work to consist in the building of a whole house, for \$2,650, not five separate jobs, to consist in the building of the parts of a house distributed into five certain parts, with a separate price to each part.

Attachment and Garnishment, from Meriwether Superior Court. Tried before Judge **BULL**, at February Term, 1857.

James C. Freeman sued out an attachment, returnable to the Superior Court of Meriwether county, against **David S. Campbell**, for the sum of five hundred and fifty-two dollars.

The **Greenville Masonic Lodge**, No. 57, was served with summons of garnishment.

The garnishee, by its committee, answered, setting forth that they employed, by written agreement, the defendant **Campbell**, to build a **Masonic Female College**, in the town of **Greenville**. That by the terms of said agreement, **Campbell** was to build said house, furnishing all the materials, (except mason's) for the sum of \$2,650, payments to be made as follows, viz: Five hundred dollars to be paid to him when the house was framed and raised; \$500 when the building was enclosed and the roof put on; \$500 to be paid when the floors were laid and partitions set; \$500 more when the ceiling was finished and all the carpenter's work completed; and when the painting was done and the keys delivered the balance \$650 was to be secured by the obligation of the committee, and to be paid the January thereafter. That in pursuance of said contract, **Campbell** entered on the

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work, and went on to frame and raise the house, enclosed the same and put on the roof, at which period of the work, and before the floors were laid and partitions set, they paid him the sum of \$1,596 07, being more than was due, as they said, by \$596, when said Campbell left off the work and abandoned the contract, and left them to finish the house, which they did at considerable expense; and, under this state of facts, insisted that they were not indebted to said Campbell, or had any effects of his in their hands.

This answer plaintiff traversed, alleging that said Campbell had done a large amount of work, and furnished a quantity of materials, for which they had not paid him, and for which they were still indebted to the amount of \$1,000.

On the trial of the issue formed on this answer and traverse, the plaintiff offered in evidence, the depositions of Gilman J. Drake, to prove the amount and value of the work done and materials furnished by Campbell, which evidence was objected to by respondent's counsel; the Court sustained the objection and excluded the testimony; but allowed plaintiff to prove the amount and value of work done and materials furnished, after the third condition complete; and plaintiff excepted.

Wiley F. Jones, witness for plaintiff, testified, that after Campbell left, the committee took possession of the building, completed it, and appropriated it to their use. Also, that the work done by Campbell after third condition finished, was worth \$200.

Plaintiff proposed to prove further, that the work done by Campbell, for which he had not been paid, was worth \$300; that one of the committee had said that the house could be finished for \$650, and also that if Campbell had worked three weeks longer, he would have been entitled to another \$500, all of which, on objection, was rejected by the Court, and plaintiff excepted.

The plaintiff offered to prove that the house was finished

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after Campbell left, at the actual cost of \$800, which was also rejected, and plaintiff excepted.

The Court charged the jury, that the keeping possession of the house, by the Lodge, after the abandonment of the work by Campbell, was not such an acceptance, as amounted to a rescision of the contract on their part. That Campbell's abandonment of the work did not effect a rescision of the contract, unless the Lodge consented to, or acquiesced in it; and that the Lodge was liable for any materials belonging to Campbell, which they had used and appropriated.

Plaintiff's counsel requested the Court to charge, that if after Campbell left, the Lodge took possession of the work done, and materials furnished by him, it was an abandonment of the contract by them, and evidence of their acquiescence in Campbell's abandonment, and they are liable for the work done and materials furnished, after deducting the amount paid to him. And further, that if a special contract was made between the parties to build said house, and Campbell left the same before completing it, and respondents took possession of the building, and appropriated to their use the work and materials which had been done and furnished by Campbell, then they are liable to pay to him the value of the work so done and materials so furnished; which charge the Court gave, with this qualification, "that if work is to be done on property already in one's possession, according to a specified contract, and for a certain price, and the undertaker abandons it, it is not taking possession of his work, because he is already in possession," to which plaintiff, by his counsel, excepted.

The jury returned a verdict for respondents. Plaintiff moved to set aside the verdict and for a new trial, on the grounds above excepted to.

The motion for new trial was overruled, whereupon plaintiff's counsel excepted, and tenders his bill of exceptions, &c.

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HALL, for plaintiff in error.

B. H. HILL and McMATH, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

Is it the meaning of the contract, that Campbell was to do the work as one job, for one sum, or as five jobs, for five sums? That he was to build the house and furnish the materials, (masonry materials excepted,) as one job, for \$2,650, or that he was to frame and raise the house as one job, for \$500; to enclose and roof the house as a second job, for \$500; to lay the floors and set the partitions as a third job, for \$500; to put up the ceiling and do the remainder of the carpenter's work, as a fourth job, for \$500; to paint the house and deliver the keys to the Lodge, as a fifth job, for \$650, payable on a credit?

If the meaning of the contract is, that Campbell was to do the work as one job, for one sum, then, although he left the work in an incomplete state, still, the Lodge was bound to pay him for it whatever it was worth, estimated at the contract rate of value; because the Lodge *accepted* the work in its incomplete state. If therefore, the work was in a state of half-completion, the Lodge was bound to pay him \$1,325, if in a state of three-fourths completion, the Lodge was bound to pay him \$1,987 50. In a word, the sum which the Lodge was bound to pay him, bore the same relation to \$2,650, that the house in its incomplete state would have borne to the house in its complete state, if the house had ever been advanced to a complete state.

If the meaning of the contract was, that Campbell was to do the work as five jobs—the five aforesaid—and if some of these jobs were completed by Campbell, before he quit the work, and others not, then, the lodge was bound to pay him for the completed jobs the full prices agreed on for them, and to pay him for the others, such sums as bore to their respec-

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tive prices the same relation which the respective jobs, in their incomplete state, would have borne to the same jobs, respectively, in their complete state, if they had been advanced to a state of completion.

On the first hypothesis, the proper question for Court and jury would be: what was the *contract* value of the work in its incomplete state. That is, it would be this: if the work in a state of completeness would have been worth \$2,650, what was it worth in its state of incompleteness?

And any evidence going to show, that if the work, in a state of completeness, would have been worth \$2,650, the work in its state of incompleteness was worth so much, or so much, would have been admissible.

And, as it is to be presumed, *prima facie*, that the contract was a fair contract, it is to be presumed, *prima facie*, that \$2,650, the *contract* value of the work, was the *real* value of the work. Therefore, any evidence going to show the *real* value of the work in its incomplete state, would have been *prima facie* evidence, going to show the *contract* value of the work; and, consequently, would have been proper evidence to be admitted.

Now, the Court below, it seems, thought, that it is the second of the two hypotheses that is the true one; but this Court thinks that it is the first.

This Court thinks that the meaning of the contract is, that Campbell was to do the work as a single job, for the sum of \$2,650, payable in installments.

The contract is headed thus: "Specification for the labor and materials to erect the Masonic Female Institute, at Greenville Georgia."

Then follow specifications under these titles: "Dimensions," "Frame," "Weatherboarding," "Cornice," "Roofing," "Windows," "Doors," "Furniture," "Trimmings," "Rooms," "Partitions," "Ceiling," "Balcony," "Conditions," "Stairs and outside Steps," "Tinner's Work," "Painting," "Mason's Work," "Base or Wash-board."

The specification under the title "Conditions," is in these words: "The whole of the materials, (except Mason's materials,) to be furnished by the builder, and the work to be done in a workmanlike and substantial manner, for the sum of twenty-six hundred and fifty dollars, the payments to be made in the following manner: when the building shall be framed and raised, then the sum of five hundred dollars shall be paid; when the house shall be enclosed and the roof put on, then the second sum of five hundred dollars shall be paid; when the floors shall be laid and the partitions set, then the third sum of five hundred dollars shall be paid; when the ceiling is put up and all the carpenter's work shall be done, the fourth sum of five hundred dollars shall be paid; when the painting shall be done and the keys delivered, then the obligation of the undersigned for the payment of six hundred and fifty dollars on the first day of January next, shall be given; the whole of the work to be under the supervision of a superintendent, to be appointed by the Building Committee, who shall give the orders for the money when due."

Now, much of all this seems to be entirely inconsistent with the work's being a work in five jobs, each job with its separate price; whilst none of it is inconsistent with the work's being a single job, at a single price. True, the price is to be paid in five sums, but the reason for that might well be, that the price *fell due* in five installments. It certainly is not said of any one of the sums, that such sum is to be the *measure of the value* of the part of the work on the completion of which the sum was to be paid. Nor are the specifications headed as specifications for the *parts* of a house, distributed into certain parts; nor are they in themselves, suitable for the parts of a house, distributed into any parts. Indeed, the house is not distributed into five parts, or into any number of parts. The specifications are headed as specifications for a house, as a whole; and they are suited to a house as a whole.

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We think, therefore, that it was the meaning of the contract, that Campbell was to do the work as a single job, at the price of \$2,650. Therefore, as has been above stated, the proper inquiry for the Court and jury was, what was the contract-value of the work, in its incomplete state; and, on that inquiry, as contract-value, and *real* value may be, *prima facie*, taken to be the same, any evidence going to show the real value of the work, in its incomplete state, was admissible. That value being ascertained, the question whether the Lodge as garnishee, owed Campbell any thing, was to be determined by comparing the value thus ascertained, with the amount of the payments made by the Lodge to Campbell.

This being so, we think, that the Court below erred in not allowing the plaintiff to prove what was the value of the work done by Campbell in its incomplete state; and in not charging the jury, that if the value of the work in its incomplete state, the value estimated by the contract rate of value, exceeded the payments, the Lodge was still indebted to Campbell for the excess.

Therefore a new trial is ordered.

Judgment reversed.

NO. 40.—DAVIS SMITH, adm'r, plaintiff in error vs. ROBERT IVERSON and WIFE, defendants in error.

Where relief is sought in a bill in equity, filed in defence of a common law action, the Superior Court of the county has no jurisdiction of the case, if the defendant, or if more defendants than one, one of them, does not reside in the county.

In Equity, from Fayette Superior Court. Decision by Judge BULL, at September Term, 1856.

Smith, adm'r vs. Iverson and Wife.

Davis Smith of the county of Monroe, as administrator of Ivy Brooks, deceased, late of the same county, instituted his action in the Superior Court of Fayette county, against Robert Iverson of that county, for the recovery of the sum of \$3850, due on a promissory note.

Iverson and his wife, who was a daughter of said Brooks and entitled to a distributive share of his estate, filed this bill against said Smith, setting up various matters of equitable defence against the note, and the prayer of the bill was for discovery, relief and injunction. To their bill complainants made an *amendment*, praying that Smith, as administrator of said Brooks, be compelled by decree of the Court, to deduct from said note, one half of the original purchase money of the land, the consideration of the note, which was a donation or advancement by said Brooks to his daughter, Mrs. Iverson, with the interest thereon.

To this amendment, defendant demurred, on the ground that defendant not being a resident of the county of Fayette at the time of the filing of complainants' bill, the Court has no jurisdiction to grant relief or to entertain a bill for relief out of the county of his, defendant's, residence.

The Court overruled the demurrer, and counsel for defendant excepted.

CABINNESS, for plaintiff in error.

ALFORD & WOOD, for defendants in error.

By the Court.—McDONALD J. delivering the opinion.

The question presented in the record is one of jurisdiction.

Davis Smith instituted a suit in the Superior Court of Fayette county, on a promissory note against Robert Iverson, one of the complainants. During the pendency of the action the complainants filed their bill in chancery, and afterwards amended it, as set forth in the statement of the case. Davis

Smith, adm'r vs. Iverson and Wife.

Smith resides in the county of Monroe. The bill was filed in the county of Fayette, where the common law suit, instituted by Smith against Iverson, is pending.

The question of jurisdiction of Courts of Equity, over the person of defendants, has been several times before this Court. The judgments passed in these cases, we consider, settle the point made in this case. This Court has decided that "A citizen cannot be called to answer out of the county of his residence, wherever his antagonist may choose to proceed against him in a Court of Chancery." When a common law suit is properly located, and a bill in equity against the plaintiff in the suit who resides in a different county, is instituted by the defendant, it does not follow that he can be brought out of his own county to answer where the common law suit is brought. *Rice vs. Tarver, et al* 4 Ga. 571; *Jordan vs. Jordan* 12 Ga. Rep., 79. In this State there is a local jurisdiction which must be regarded in the institution of suits in equity. In all cases in which there must be a trial, the suit must be brought in the county of the residence of the defendant, or if more defendants than one, in the county of the residence of one of them. If no trial be necessary, but the bill be for discovery only, then the constitution (neither by its letter or spirit) interposes no impediment to its being brought in the county in which the suit, in which the discovery is needed, is pending. On bills for discovery merely, there never is a trial, but the discovery goes, at the option of the party who seek it, before the jury as evidence on the trial of the issue made up between the parties in the Court of law. If the complainant seeks a decree to enforce a right which he claims, he seeks relief, and in that event the Court has no jurisdiction, if none of the defendants are citizens of the county. *Carter and another, vs. Jordan, adm'r &c.*, 15 Ga. Rep., 84.

Davis Smith is a citizen of Monroe county, the bill is filed in the Superior Court of Fayette county; the bill asks more than a discovery, it calls for a full account of complainant's,

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Mrs. Iversons' interest in the estate of Smith's intestate, who was her father.

There is no controversy about the title to the land, so that it cannot be claimed that the Superior Court of Fayette county has jurisdiction of the case on that account. The charges are in regard to the manner in which complainant obtained the note. But the bill shows enough to convince us that no case can be made of the facts as stated, to give the Court of Fayette county jurisdiction of it, because it is a suit respecting the title to land. Such a case as is contemplated by the constitution can not be made of it, and the judgment of the Court below must therefore be reversed.

Judgment reversed.

No. 41.—EDMUND W. HOLLAND, plaintiff in error, vs. JOHN T. CHAMBERS and BERRIEN WILLIAMS, defendants in error.

- [1.] If a note, charged with being usurious, have its origin or grow out of a transaction with a partnership which was dissolved before the note was given, it is legal and competent to inquire into that transaction, so far as it may be necessary to elucidate the matter in issue to the jury.
- [2.] If an usurious debt due by a firm, be divided on its dissolution, and each partner assume a part, the division of the debt does not purge it of the usury, and the original contract between the firm and the plaintiff may be inquired into by one of the partners to sustain a plea of usury.
- [3.] If the entire consideration of the note was the usury agreed to be paid, no part of it is recoverable.
- [4.] The principal of a joint and several promissory note, against whom a process was sued out, but no service made, and who was no party to the issue, is a competent witness for his sureties, to sustain a plea of usury, if he be released by them from the costs.
- [5.] Evidence may be admitted in support of a plea substantially good, but deficient in form.

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[6.] Defendants must sustain their plea of usury by proof of such facts as will enable the jury to come to a decision as to the usury paid.

[7.] If the verdict be contrary to law and evidence, a new trial will be granted.

Debt, from Carroll Superior Court. Tried before Judge HAMMOND, at October Term, 1856.

This was an action by Edmund W. Holland, against Clayton Williams, principal, and John T. Chambers and Berrien Williams, securities, on a promissory note for \$2,213 12, dated 8th July, 1851, and due the 4th of January thereafter.

The Sheriff returned service on Chambers and Berrien Williams, and *non est* as to the principal, Clayton Williams.

The securities pleaded the general issue and *usury*.

From the testimony, it appears that one Abel Harrison and Clayton Williams were copartners under the style of Harrison & Williams, engaged in the business of gold digging. They commenced business in the year 1843, and dissolved in 1846. The plaintiff Holland made a contract with said firm to advance them money and to receive gold dust or bullion in exchange or payment; and a deduction of two per cent. per month was to be made from the standard value of the dust which he was to receive; or in other words, that for every hundred dollars loaned or advanced they were to pay at the end of each month, in gold dust or bullion one hundred and two dollars, and at that rate estimated and renewed or counted as if renewed, monthly. Upon these terms Holland made advances to the firm during the partnership, amounting to more than \$10,000, and upon the dissolution in 1846, there was a balance due to him of about \$3,000, and by arrangement between Holland and the parties, Harrison assumed individually the payment of about \$1,800 of this debt, and Williams of about \$1,200, for which he, Williams, gave his note, which he occasionally renewed, at the same rates and upon the same terms that the money was original-

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ly advanced, until it amounted to the sum of \$2,213 12, computed at the rate of two per cent. per month up to the 4th of January, 1852, and for which Williams gave the note sued on, with Chambers and Berrien Williams securities.

The jury, under the charge of the presiding Judge, found for the defendants, and plaintiff sued out a *rule nisi* for a new trial, upon the following grounds, to-wit :

1st. That the jury found contrary to law and the evidence, and contrary to the weight of evidence.

2d. That the Court erred in not rejecting the testimony of Abel H. Harrison, so far as the same related to the accounts between Harrison & Williams and Holland, and not rejecting his evidence as to the two per cent. per month in those accounts.

3d. That the Court erred in permitting the defendants to introduce any evidence in relation to the accounts between plaintiff and said partnership.

4th. That the Court erred in holding that if there was any usury in the debts between the copartnership of Harrison & Williams, and Holland, and the debt divided, and Williams assumed to pay a certain portion thereof, and gave a new note with other security, Harrison being released, that the usury of the original transaction still affected it.

5th. That the Court erred in charging the jury that if they believed from the evidence that the note was all usury, that they should find for the defendants, and that change of the parties and releasing Harrison made no difference.

6th. That the Court erred in admitting the testimony of Clayton Williams, he being the principal, and residing out of the State.

7th. That the Court erred in admitting any testimony of usury under the pleas.

8th. That the jury found contrary to the charge of the Court in this, that it was the duty of defendants to prove the amount of principal and usury, and if they failed to do so,

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it was their duty to find the whole amount of the note in suit.

9th. That the Court erred in charging the jury anything about the indebtedness of *Harrison & Williams* to Holland.

After argument, the Court discharged the *rule nisi* on all the grounds taken, and refused a new trial. To which decision counsel for plaintiff excepted, and assigns error thereon.

LATHAM and GLENN, for plaintiff in error.

HILL & SON, and HAMMOND, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

The errors assigned in this case are upon the refusal of the Court to grant a new trial. The record does not disclose, clearly, the rulings of the Court upon the several points raised by counsel, during the progress of the trial. The points themselves and the decision of the Court upon them, appear imperfectly, and by inference from the motion for the new trial. The Court granted the *rule nisi*, and his having granted it, is equivalent to a certificate on the part of the presiding Judge, that what transpired on the trial, so far as it is stated in the rule, is stated correctly. We shall so consider the grounds set forth in the motion, and proceed to examine them, passing over the first ground, until we dispose of the balance.

[1.] The first ground of error, then, that we shall consider, is the refusal of the motion for a new trial, so far as it was predicated on the objection to Abel H. Harrison's evidence. Harrison testified that, during the existence of a partnership between himself and Clayton Williams, the plaintiff advanced to them, at sundry times, the sum of \$10,000 or more. The firm was dissolved in 1846, at which time it owed the plaintiff the sum of \$3,000, that a portion of that sum was accumulated by interest at two per cent. per month on gold dust

er bullion, but he could not tell what part of that sum was principal or what part was interest, but supposed the interest amounted to from seven to fifteen hundred dollars; that gold bullion was worth one dollar per pennyweight, and that the "contract for the usury was made before the advances commenced." The object of Harrison's evidence was, to show the origin of the transaction, to trace it down to the close of the partnership, and to prove that the indebtedment of the firm to the plaintiff at that time was the consideration of notes for which the note sued on was given. This Court, long ago, held that the infection of usury follows all securities, however varied in form and amount which may be afterwards given for the same debt. *Bailey vs. Lumpkin*, 1 *Kelley's Rep.* 410. Harrison proves the contract, the value of the bullion, the advances to the firm, the terms on which the advances were made, the amount the firm was indebted to plaintiff at its dissolution, and for what portion of that debt Williams gave his note. This evidence was certainly admissible under the law. It is true that Harrison does not identify the note sued on, as growing out of this transaction, but that may be done by the evidence of other witnesses.

The third ground in the motion was properly overruled by the Court, for the same reason.

[2.] The decision of the Court that, if there was usury in the debt due by the partnership to the plaintiff, and Williams, one of the partners, gave a note for a part of that debt with other securities, that note is affected by the usury in the original transaction, is in accordance with the principal to which we have already referred. The parcelling out of an usurious partnership debt amongst the individual partners, whether before or after the dissolution of the partnership, does not purge the debt of the infection of usury. Prior to the Act of 1822, *Prince* 295, such contracts and notes were void in toto, and neither principal nor interest could have been recovered. Since that Act, down to the time of the date of the note sued on, the principal of the debt might be

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recovered, and nothing more; and that is the law of this case. If any portion of this partitioned debt is principal, each partner is liable to pay his proportion, but, still, every part of it is affected by the usury and subject to be reduced by its proportion of the usury.

[3.] It follows from what we have said, that if the entire consideration of the note was the usury to be paid for the money advanced, no part of it was recoverable, and the jury should have found for the defendants, and that there was no error in the charge of the presiding Judge to the jury to that effect.

[4.] It is objected to the decision of the Court in another ground taken for a new trial, that he admitted the testimony of Clayton Williams, he being the principal to the note and residing out of the State. Process was sued out against Clayton Williams, but he was not served. He was not, therefore, a party to the issue to be tried by the jury. He was not objectionable on the score of interest, except because of his liability for costs to his sureties if the recovery should be against them. He was released by them from that liability. Holland had his remedy against him. The note is a joint and several note. The release removed all objection to his competency. *Lefents vs. Dematt and Ingersoll*, 21 *Wendl.* 136. *Downing vs. Townsend*, 14 *East*, 565.

No particular part of the testimony is pointed out in the record, as inadmissible under the plea of usury.

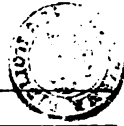
[5.] The pleas are not all very formal as pleas of usury, but they were certainly sufficient to authorize the Court to have admitted some evidence of usury. The facility with which the pleadings, under our statutes of amendment, may be modified to suit the evidence, has given rise to much irregularity and looseness in pleadings, and has rendered rare, exceptions to evidence arising from the insufficiency of the pleadings. Exceptions however, where grounds for them exist, ought to be sustained. But when this Court is called on to revise the decision of the Court below, the record

must state fully the ground of that decision. In this case if *any* evidence was admissible under the pleas, the error assigned must be overruled.

We are at a loss to ascertain from this record, what the charge of the Court to the jury was, in regard to the indebtedness of Harrison & Williams to Holland, but from what we have already said, it will be seen that it was necessary to examine into that to reach the origin of the transaction from which the consideration of the note sued on springs, and to determine properly on the merits of the defence.

[6.] It seems from the bill of exceptions, that the Court charged the jury that it was incumbent on the defendants to prove the amount of principal and usury, and if they failed in that, the jury should render a verdict for the whole amount of the note; and it is alleged that the jury found contrary to the charge of the Court. If they did find contrary to this charge, the verdict must be contrary to law, evidence and the weight of evidence, for we consider the charge to be in accordance with the law.

[7.] Did the evidence before the jury establish that the whole amount of the note sued on was constituted of usury, and if so, was it usury to be paid by Williams or had Williams been placed in funds by Harrison in any way, to pay his part or a portion of it? If the transaction was an usurious one, all the witnesses concur in saying that the rates were two per centum per month on advances or loans, by whatever name they may be called. The jury found that the transaction was usurious. It was their province to pass on that, determining on the interest of the parties, from the facts in proof. We think the evidence warrants the conclusion as to the interest of the parties, drawn from the evidence. Whether it warranted them in finding that the whole amount of the note was made up of the accumulations of usury agreed by the parties to be paid, and if it was, whether it was made up of the part to be paid by Williams, exclusively of Harrison's part, or if Harrison's part was included, whether he was



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placed in funds by Harrison to pay any part of it, is another question. Harrison & Williams concur in saying that the indebtedness of the firm of Harrison & Williams to Holland, at the dissolution of the partnership was three thousand dollars, and Williams testifies that of this sum, one thousand dollars or more was usury. Harrison deposes that from seven to fifteen hundred dollars was usury, and he does not testify to the giving of any note by Williams, but that he assumed the payment of \$1,200 or upwards. According to Williams' evidence, he gave a note of one thousand dollars, in payment of part of the sum due the plaintiff on the dissolution of the firm of Harrison & Williams, and that note with the accumulation of interest at two per cent. per month, after due renewals, constitutes the consideration of the note sued on. He does not state what part of the note of one thousand dollars was usury, but it was insisted on the argument, that Harrison paid eighteen hundred dollars, and that sum paid all, except the usury. Such however, is not the evidence, and Williams cannot claim that the note given by him was made up exclusively of the usury, by applying the payment made by Harrison to the extinguishment of the principal. If the plaintiff received a sum equal to the whole amount of his principal, from the parties, say they, whether before or since the dissolution of the partnership, what remains must be usury. We recognize no such principal.—when the firm closed and the debt was partitioned, each one assumed his part of the principal and interest, and it cannot be claimed that the amount of usury paid by Harrison, shall extinguish any part of the principal of the note given by Williams. The verdict of the jury, then, upon the testimony of Harrison and Williams was contrary to evidence. How does it stand on the evidence of the plaintiff, which seems to me to be wholly irreconcilable with that of the other witnesses? He does not consider, he says, that he loaned at usury. The opinion of the plaintiff cannot give character to the transaction. The jury must draw their conclusions from the facts in proof.

When the plaintiff paid the parties for gold dust and bullion, he paid them one dollar per pennyweight, when it was delivered at the time.

In his estimation, then, the pennyweight of gold was worth one dollar. When he let them have the money and the delivery of the bullion was deferred, there was to be a deduction in the price of the gold of two cents per pennyweight, per month. If the payment was deferred for twelve months, the pennyweight of gold, at the unchanged value of one dollar, was to be paid at seventy six cents. No interest was charged by the plaintiff for the advance of his money, but he was to receive pay in gold, depreciated by contract, to seventy-six cents, when it was worth one dollar per pennyweight. When the note of \$2,213 12 was given and the note of \$1,456 was taken up, he says he did not calculate interest or premium on the note taken up. The settlement was made and the note given, extending the time by calculating the discount upon the price of the gold dust at two cents per dwt. per month. He says the parties agreed to sell him gold dust or bullion. According to him, then, the whole transaction was a traffic for gold dust or bullion. He paid his money in advance, and they agreed to pay him gold dust or bullion. Such is not the written evidence. The parties do not promise to pay gold dust or bullion, in a single note presented in record as evidence. They are all promissory notes in the usual form for money. We are not prepared to say, therefore, that the jury found upon the plaintiff's evidence, if they predicated their verdict on that, a verdict contrary to evidence, when they found the note to be usurious. The verdict then should stand, so far as it finds the contract to be usurious. It does not follow that the verdict should have been for the defendants. The plaintiff's account of the matter affords no data for determining whether the whole sum of \$1,456 was due to him as principal or as usury; or what part was principal and what part was usury; or whether the firm had paid, in gold, valued at one dollar per

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pennyweight before its dissolution, a sum equal to the amount advanced to them by the plaintiff, thus leaving the balance as usury. There is no evidence therefore, from the plaintiff, of any definite amount of usury paid by the parties, prior to the dissolution of their partnership. The amount of usury paid or embraced in the note since the partnership was dissolved, may be collected from the evidence before us, given both by the plaintiff and the other witnesses; but their evidence is so variant and irreconcilable, that the jury must determine to which of them they will give credence. The whole Court agree that there ought to be a new trial, and my brethren are of opinion, that the usury paid by the firm to the plaintiff before its dissolution, should be ascertained, and a part bearing the same proportion to the entire usury, that the original note of Williams did to the indebtedness of the firm at that time—without regard to the fact testified to by Williams, that he assumed to pay to the plaintiff in extinguishment of the debt of the firm to that extent, the amount that he stood individually indebted to his own firm and in payment of that debt—ought to be allowed in the verdict and deducted from the note. In this view of the case I do not concur. There is no evidence of usury in the debt due by Williams to the firm of Harrison & Williams, and when he gave his own note to the plaintiff for the amount, and no more, he justly owed his own firm, he cannot claim to have the debt due by him to his own firm, and for which he had given the plaintiff his note, reduced by the amount of usury the firm had agreed to pay the plaintiff. We all agree that, the usury agreed to be paid since the dissolution of the firm was properly allowed by the jury.

Judgment reversed.

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No. 42.—WILLIAM M. HILL, relator, plaintiff in error, vs. THE COMMISSIONERS OF THE TOWN OF DECATUR, defendants in error.

[1.] The body of the Act of the 3d of March, 1856, to amend an Act, to incorporate the town of Decatur, contains nothing that is different from what is expressed in the title of the act.

[2.] The twelfth section of the Act of 3d of March, 1856, to amend an act to incorporate the town of Decatur, does not confer on the commissioners of that town, the power to *prohibit absolutely* the sale of liquor in the town: The section merely confers on them the power to exact a fee of not more than fifty dollars, for a license to sell liquor in the town.

Mandamus, from DeKalb Superior Court. Decision by Judge BULL, at chambers, February, 1857.

This was an application by William M. Hill, the relator, for a mandamus against the Commissioners of the town of Decatur, in the county of DeKalb, to compel them to grant to him a license to retail spirituous liquors in said town.

Relator averred that he had been engaged in retailing liquors in said town for more than twenty-five years, and that it was his only or principal means of supporting himself and family; that he had applied to said Commissioners for a license; had tendered a bond duly executed with good security, and proposed to take the oath required by law, and tendered the sum of fifty dollars in specie as the price of said license. That said Commissioners refused to grant him a license. Relator prayed that a writ of mandamus do issue, requiring and commanding said Commissioners to grant a license to said William M. Hill, to retail spirituous liquors in the town of Decatur, for the term of one year, upon his paying a license fee of fifty dollars, and complying with the law, and statutes in such case made and provided.

The Judge upon hearing the petition, ordered said Commissioners to appear and show cause why a preceptory mandamus should not issue compelling them to grant the license prayed for by relator.

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The Commissioners answered and showed for cause, that they had refused to grant the relator the license to retail spirituous liquors by virtue of and in accordance with an ordinance passed by said Commissioners on the 15th day of January, 1857, and a part of which ordinance is in the following words, to-wit:

“Sec. 10. No spirituous or intoxicating liquors shall be sold within the corporate limits of the town of Decatur, in less quantity than three gallons, from and after twelve o'clock of Friday the 16th day of January instant.

“Sec. 11. From and after the 16th day of March next, no person shall be allowed to sell *any* spirituous or intoxicating liquors within the corporate limits of the town of Decatur, except practising physicians for medical purposes.”

The respondents admit that relator made a tender of \$50 as a license fee, and offered to give a bond and security, and to comply with the laws relating to retailers, and demanded a license, which they refused; and they claim and assert the right to refuse said license, under and by virtue of the power and authority vested in them by the 12th section of the Act, passed at the last session of the General Assembly (1855-6,) entitled an act to alter, change and amend an act, to incorporate the town of Decatur, passed in 1823.

Judge BULL, upon hearing the answer and argument, refused to order a mandamus, and discharged the *rule nisi*:

Whereupon counsel for relator, excepted and assigns error, &c.

T. W. J. HILL, for relator.

WILSON, and EZZARD & COLLIER, for respondents.

By the Court.—BENNING, J. delivering the opinion.

The question is, ought the mandamus to have been granted? The Court below refused to grant it.

The Commissioners of the town of Decatur, in resistance to the application for a mandamus, set up the act of the 3d of March, 1856, to amend an act to incorporate the town of Decatur, and the ordinance passed by them in accordance with, what they supposed to be, the import of the twelfth section of that act.

In reply to this defence, the applicant for the mandamus took two positions.

1st. That the whole body of the said act of March the 3d, 1856, was "matter different from what" was "expressed in the title" of the act, and therefore, that the whole act was *unconstitutional*.

2d. That even if the act was not constitutional, yet, that it did not authorize the Commissioners of the town of Decatur, to *prohibit* the sale of spirituous liquors in that town.

These positions will be considered in their order.

The title of the said act of March 3d, 1856, is as follows : "An Act to alter, change and amend an act, entitled an act, to incorporate the town of Decatur, in the county of DeKalb, assented to, December 10th, 1823."

There is *no* act so entitled.

But there is an act entitled, "AN ACT to make permanent the site of [the] public buildings in the county of DeKalb, at the town of Decatur ; and to incorporate the same." And this act was assented to, December the 10th, 1823 ; and there is no other *act* at all, relating to the incorporation of the town of Decatur.

Now, the Legislature must have intended the act of March the 3d, 1856, to be amendatory of *some* act that was an act to incorporate the town of Decatur. But there is no act that was an act to incorporate the town of Decatur, except the act aforesaid. Therefore, the Legislature must have intended the act of March the 3d, 1856, to be amendatory of the act aforesaid.

But if they did so intend, then it is manifest, that there is

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nothing in the body of the act of March 3d, 1856, that is different from what is expressed in the title of the act.

[1.] We think that there is nothing in the body of the act that is different from what is expressed in the title of the act; and, therefore, we think that the act is not unconstitutional.

[2.] Does the act give authority to the Commissioners of the town of Decatur, to *prohibit* the selling of spirituous liquor within that town? If any part of the act does, it must be the twelfth section. The twelfth section is in these words :

“And be it further enacted, That said Commissioners of the town of Decatur, or a majority of them, shall have power to restrict, prohibit, and regulate the sale, vending and distribution of all distilled spirituous and intoxicating liquor in the corporate limits of said town, and any person or persons violating the ordinances of said Commissioners, passed in pursuance of the power granted by this section, shall, in addition to the penalty prescribed by said Commissioners, be subject to all the pains and penalties to which persons are now subject by law, for retailing liquor without license: provided, no license to retail spirituous liquors shall exceed fifty dollars.”

It is no doubt difficult to give a perfectly satisfactory interpretation to these words.

The word *“provided,”* standing where it does, must mean *on condition*. *Lord Cromwell's case, 2. Cok. 72; Simpson vs. Titterell, Cro. Eliz. 242.*

Let the words *“on condition”* be substituted for the word *“provided.”*

The section will then read thus: “That said Commissioners,” &c. “shall have power to restrict, prohibit, and regulate the sale,” &c. *“on condition,”* that “no license to retail spirituous liquors shall exceed fifty dollars.”

Reading thus, the section it would seem, imports this:

that the Commissioners shall have power to restrict, prohibit and regulate the sale of liquor, on condition, however, that they do not exercise the power, further than to exact a fee of not more than fifty dollars for a license to retail the liquor.

And this we think is the import of the section.

It is true, that if this be the import of the section, the *proviso-part* of the section is, to some extent repugnant to the rest of the section. The rest of the section is, that the Commissioners may prohibit absolutely; this *proviso-part* is, that they may prohibit, if exacting a license fee of not exceeding fifty dollars, will amount to a prohibition. Now, as to many persons, the exaction of such a fee would amount to a prohibition; but not as to all.

Does such a degree of repugnancy render the *proviso-part* void?

We think not.

1. It is a general rule, that some effect ought to be given to every part of a statute, if possible.

By holding the *proviso-part* of this section of this statute to be good, we do nothing that prevents the rest of the section from having considerable effect; whereas, if we hold the *proviso-part* to be bad, we shall do what would prevent so much of the section as consists of that part from having any effect at all.

2. It is according to high authority, that when the *proviso* of a statute is repugnant to the purview of the statute, the *proviso*, speaking the last intention of the law-giver, repeals the purview. In this respect a *proviso* differs from a *saving*. *Dwarris on Stat.* 659,660, citing *Fitzgibbon* 195.

3 The power absolutely to prohibit the people of a town, from the "sale, vending and distribution of all distilled spirituous and intoxicating liquor," is an exceedingly high power. If therefore, any person claims the grant to himself of such a power from the Legislature, the onus is upon him to show, that the instrument under which he claims the grant of the power, does grant the power. And this onus he does

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not cast from himself, by showing that the instrument under which he claims the grant of the power, is susceptible of a construction which would grant him the power, if the instrument is also susceptible of another construction, one which would withhold from him the power.

4. All grants to corporations are to be construed strictly.

The conclusion then to which we come is, that this twelfth section does not confer the power on the Commissioners, absolutely to prohibit the sale of liquor in Decatur; but that it merely confers the power on them to exact a license fee of not more than fifty dollars, from those who would retail liquor in that town.

And this being our conclusion, we think that the 10th and 11th sections of the ordinance of the Commissioners, passed on the 15th of January 1857, were void.

This being so, are we not to say, that the mandamus should have been granted. No.

The mandamus prayed for, was a mandamus to compel the Commissioners to issue a license to the applicant for the mandamus on his paying them fifty dollars.

The Commissioners had passed no ordinance fixing the fee of a license; they were not bound to pass any ordinance fixing such fee. They might if they pleased, remain passive on the subject of license. Therefore as the case stood, they were not bound to issue a license to any one, on any terms. Nor, on the other hand, did any one need a license from them. As long as they remained passive on the subject of license, every person had the right to sell liquor in the town, on complying with the general law on the subject of license.

So that, after all, we think, that the Court was right in refusing the mandamus.

Judgment affirmed.

No. 43.—THOMAS BARNES, plaintiff in error, vs. JOHN STEPHENSON, defendant in error.

Where a note is given by an executor to a legatee, for the balance of the estate in the executor's hands, and it turns out that the note has been taken for too much, the maker is entitled to have it scaled down to the true amount, with or without any stipulation to that effect at the time of the settlement.

Debt, from Dekalb Superior Court. Tried before Judge BULL, at October Term, 1856.

This was an action of debt by Thomas Barnes, on a due bill for \$1,228 50, given by John Stephenson, principal, and John Faulkner, security. Stephenson and Faulkner were the executors of Anthony Peeler, deceased, late of the county of Jasper, and the plaintiff, Barnes, having married a daughter and legatee of Peeler, called on the executors for his wife's share of her father's estate; and upon settlement the due bill, which is the foundation of this suit, was given by Stephenson, signing the same as executor, and Faulkner as his security. The action is against Stephenson alone.

Upon the trial defendant offered in evidence the testimony of a witness, by interrogatories, to prove that the due bill was given in view of a future further adjustment of the accounts, and that it was agreed between the parties at the time said due bill was given, that if it should be found thereafter that there was not that amount due to plaintiff, a credit should be placed on said due bill, reducing it to the true and correct amount; which evidence was objected to by plaintiff, upon the ground that it went to contradict, vary and add to a written instrument.

The objection was overruled by the Court, and the plaintiff excepted.

Defendant then offered in evidence an exemplification of his accounts and returns as executor, from the Court of Ordinary of Jasper county, for the space of eleven years, to

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which plaintiff objected, upon the ground that the matters contained in said exemplification were settled by the giving of the due bill, and because plaintiff could not be supposed to come prepared to controvert said returns in this action; also because the jury would not be authorized to find more than the amount of the due bill in this suit, although a larger sum might be ascertained to be due, from an investigation of the accounts. This objection was also overruled by the Court and the testimony admitted, and plaintiff excepted. The jury found for the plaintiff, four hundred and three dollars and fifty-nine cents, which, after deducting a credit of \$650, paid on the due bill in 1853, was three hundred and sixty dollars less than the amount due on the face of the note.

Plaintiff moved for a new trial, upon the exceptions above mentioned, and because the verdict was contrary to law and evidence, which motion was refused, and plaintiff excepted.

EZZARD, for plaintiff in error.

CALHOUN and MURPHY, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

It is admitted that the note sued on was given for the legacy coming to the plaintiff, in right of his wife, from her father's estate, and that this constituted the only consideration for the note. The defence: that it was given for too much. To prove this, the defendant introduced an exemplification of his returns to the Ordinary. The jury were satisfied by a calculation, that there should be deducted from the note, some four hundred dollars; and this we hold they had a right to do, independent of the parol agreement alleged to have been made, that any mistake might be rectified. This condition is implied in every such settlement. Indeed, although the parties were silent upon the subject, and a re-

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ceipt in full had been given, still, it would be subject to be re-opened, the burthen being upon the party alleging the error. True it might be waived. Such is not our understanding of the conduct and conversation of the parties, at the time the note was given. The dispute was as to a portion of the returns, respecting the board of plaintiff's wife. The returns as to these, were *prima facie* evidence in favor of Stephenson, the executor, and if not falsified, conclusive. The jury were the proper tribunal to decide this matter.

The plaintiff complains of surprise in allowing the records of the Ordinary to come in as proof. Why should he be? The defendant, by his plea, notified him that he should rely on this defence. He should have come prepared to rebut it.

It is argued that the rule should work both ways, and yet, that if the returns showed a larger balance due the plaintiff, than the note called for, he could not recover the excess; and it is true he could not, in the present action. Still, he could in another form; and this does not show that the defendant is not entitled to have his note abated, to the extent, that the consideration has failed. If Courts of law could grant adequate relief, as the Legislature ought to enable them to do, the plaintiff in the case supposed, might have judgment for the excess.

Judgment affirmed.

No. 44.—WILLIAM MITCHELL, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] It is the privilege of the party, who complains of the judgment in the Court below, to make out and tender to the Judge, who presided in the case, his bill of exceptions; and if it be consistent with what transpired in the cause; in other words, if it containe the truth, the whole truth, and nothing but the

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truth, and all the evidence material to a clear understanding of the errors complained of, it is the duty of the Judge to certify and sign the same.

If the bill of exceptions is not true and sufficiently full, so as to present the points fairly, the Judge may refuse the same, or suggest the defects so that the party may amend, or the Judge may rectify it himself.

The party may accept the bill as altered by the Judge, or reject it as he may see fit. Having accepted and presented it to this Court, he is bound by it, and the case must be decided accordingly.

- [2.] Where a motion to continue a cause is refused, for want of diligence, and yet the witness is brought to the Court and testifies, it is no ground for a new trial—admitting that the Court erred in overruling the motion.
- [3.] All grounds of a motion for a continuance must be urged and insisted on at once. And after a decision upon one or more grounds, no others, afterwards urged, will be heard by the Court.
- [4.] It is not error in the Court to inquire of the prisoner or his counsel, if he will waive the arraignment, bill of indictment, and list of witnesses.
- [5.] When the Solicitor General is prevented by sickness or other malady, bodily or mental, from prosecuting, the Court may appoint some suitable person in his place.
- [6.] It is no ground for a new trial, if one of the empaneled jurors assist the State in selecting a jury—the Court not noticing the fact, and the juror having disqualified himself from serving, upon his preliminary examination.
- [7.] If the Court has cause to apprehend that the juror misapprehends the meaning of the statutory questions propounded for the purpose of testing his indifference, the Court may restate them to the juror.
- [8.] The Court may take down the testimony itself, or appoint another to do it. When the Judge officiates, he should make no comments upon the testimony as taken down; and he should incorporate the whole of it.
- [9.] It would be better neither for the Court or counsel, to refer to the power of the appellate tribunal, except to cite its authority as made known through its decisions.
- [10.] In recognizing the right of the jury to judge of the Law, as well as the facts, the Court should not do it grudgingly, so as to restrict the jury in the full and free exercise of their right.
- [11.] Included in 9.
- [12. 13.] While it is true at common law, and in certain cases, under the penal code, that one person may kill another for the prevention of a forcible and atrocious crime, still to make such homicide justifiable, there must be an absolute necessity for it; and it must be done in good faith to the public and not in the gratification of revenge, or the execution of a preconcerted plan or conspiracy, to take the life of the person killed.
- [14.] As to reasonable doubts, the rule is simply this—that juries must not give their verdict against the prisoner, without plain and manifest proof of his guilt; which implies that where there is doubt, the consequence should be acquittal of the party on trial; and it is not error, for the Courts to read from the

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books of Reports of this Court its exposition of this doctrine, by way of charge in explanation to the jury.

- [15.] In charging a jury in a criminal case, it is not proper for the Court to excite their feelings by passionate appeals to their imagination; but it may remind them, that they are intrusted with the administration of public justice on the one hand, and with the life, the liberty, and the honor of the prisoner on the other; and that they should faithfully inquire whether he is guilty of the charge alleged against him in the indictment.
- [16.] It is no ground to grant a new trial, that the names of the jury were not each separately called, when the verdict was received, provided they were all in the box at the time it was rendered and heard it read; especially when the jury were recalled in a few moments after their discharge, and every one on oath declared that he heard the verdict read finding the defendant guilty of murder, and that he agreed to it.
- [17.] When the verdict of the jury is contrary to law, or strongly and decidedly against the evidence, a new trial will be granted.

Murder, from Walker Superior Court. Tried before Judge BROWN, at November Term, 1856.

William Mitchell was indicted and put upon his trial for the murder of John S. Cole.

Defendant was asked if he was ready for trial. His counsel answered that he was not, on account of the absence of a material witness, Sarah Cope, who resided out of the county about twenty miles distant. Upon this showing the presiding Judge refused to allow a continuance, but sent an officer for the witness, *who had been subpœnaed*.

Counsel for prisoner requested the Court to insert in the order which he issued for Sarah Cope, the name of another witness, Green, who had not been subpœnaed, whose testimony to the same facts, he desired to have. The Judge inserted his name, and replied that he would render the prisoner any assistance in his power, but that *the trial must proceed*. The bailiff brought the witness, Sarah Cope, who was examined as a witness, on the part of the prisoner, but failed to get Green.

To this ruling and decision, counsel for prisoner excepted. The presiding Judge next inquired of the Solicitor General

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the back-bone. Witness did not see the first gun fired, and did not know, of his own knowledge, who fired it. The bullet, he would say, caused Cole's death. Mitchell jumped the fence, left his gun sitting in the corner of the fence, and ran off over the hill. Witness went and got the gun; witness saw no more of Mitchell; he left the country. The next time witness saw him, was in the neighborhood of Duck Town Copper Mines, some 60 miles from the place where Cole was killed, some weeks after the killing; never knew him to be in the neighborhood any more before he saw him near Duck Town. Cole and Mitchell seemed to be strangers.

Cross Examined.—Witness had been acquainted with Cole about 6 years; he would fight if imposed upon; was a brave man; has frequently seen him with arms at public times; he gambled some times. There had been a previous difficulty between Cole and Thompson. Cole had sworn he would kill him if he stayed in the country. Thompson had left a month or two. Witness had heard that Cole was coming that day to the grocery; does not know that Thompson knew Cole was coming. Witness expected a difficulty when he saw Cole and Thompson there; after Cole was shot, saw a repeater on him; thinks one barrel was not loaded; the caps looked old; does not know that it had been fired. Has known Mitchell since the first of last year. Witness was friendly with Cole. Never saw Mitchell when he was out of his right mind; has seen him drunk often; he had taken a good many drinks that day; was pretty well along in liquor. Cole and Cunnely were friendly. They were both running in the direction of some stables. That evening, at night, was the next time witness saw Thompson; he then came to the grocery door. Mitchell stood about 20 steps from the door and shot Cole about 40 yards off. Cole had out his repeater when he was running.

Re-examined by the State.—The cause assigned by Cole for threatening Thompson's life, was, that Thompson had

been sleeping with his, Cole's wife. Witness, from all the circumstances, thinks Cole had good cause for the threat.

William J. Hunt, was present some five or ten minutes after Cole rode up. Thompson and Mitchell went out together in the corner of the fence; witness passed by them, and heard Mitchell, defendant, say to Thompson, spring your triggers and cock your gun—shoot him first, if you can, God-damn him, for it's his notion to shoot you. Thompson and Mitchell both had their guns in their hands. Cole rode up towards them, a little out of his way. Thompson was standing behind a tree, and he threw his gun round and snapped at Cole. Cole flung up his hand and said, Lord have mercy, he is trying to kill me; Cole then took his pistol out of his saddle-wallet. In jerking out the pistol, it fired in the contrary course from Mitchell and Thompson. Cole then jumped off of his horse, and Thompson flung down his gun and run, and Cole run after him, and run him about forty steps. When he got 40 steps off, Mitchell shot him. Mr. Mucklehanan said you had better be a citizen of some other country. He set down his gun, and jumped the fence and run off. Witness saw no more of defendant until he was brought back a prisoner, some three or four weeks after the killing.

The description of the wound given by Mr. Wardlaw, and his death are about correct. Does not know why Cole started a little out of his way in the direction of Thompson and defendant, when he started. There were other persons he may have been going to see. Witness does not know that he went that way for the purpose of a difficulty; supposes Cole went out of his way some 8 or 10 feet. The remark made by Mitchell to Thompson, was made about the time Cole was getting on his horse. Thompson was behind the tree, and witness does not believe Cole saw him; when he started Cole was in the road leading towards Mathis's, (the place he had started to,) when Thompson snapped at him. Thompson was 25 or 30 steps from Cole when Cole was shot. Con-

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nely was only running to get out of the way for fear he might be shot. There was no difficulty between Cole and Connelly. Cole was getting on his horse 25 or 30 steps from Thompson and defendant, when defendant made the remark to Thompson about cocking his gun, &c. Cole could not have overheard the remark. He was riding slowly along when the gun snapped at him. He had drawn no weapon, made no threat or demonstration; nor had he spoken to Thompson and Mitchell when the gun snapped.

Cross Examined.—Had known Cole three or four years; had never heard him called a dangerous man, unless he was imposed on; never knew him armed till after the difficulty between him and Thompson. Witness had heard Cole say he would kill Thompson if he stayed in the country. Cole said he caught Thompson and his wife together in the act of adultery, and for this reason he could not stay about him. Thompson left and went off, and occasionally passed back. Witness anticipated a difficulty when he saw them together, having heard the threats; saw no shooting, before the difficulty, at a target; saw no pistol drawn by Cole till after he was snapped at; he then lit and ran after Thompson, with the pistol in his hand. Witness has known defendant some 12 months or more; never saw him insane; has seen him drunk frequently; when drunk he was about like ordinary drunken men.

Dr. G. G. Gordon, sworn says: Was the attending physician of Cole after shot; the wound was in the back, not quite as low as the middle of the spinal column. The ball cut or injured the spinal chord. The wound was necessarily fatal. Thinks he died of the wound.

Cross Examined.—Has examined prisoner's head—finds two scars on his head, one probably an inch and a half long. There appears to be some depression of the skull-bone. The effect of the depression of the skull-bone might produce idiocy, insanity or convulsions. Witness was called to see defendant in jail, two or three months after he was put in jail.

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He was lying on the floor ; appeared to be insensible ; found his pulse full and bounding, and was going to bleed him, when he became furious, and fought imaginary monsters in the air ; left him in that condition ; he went back next day ; defendant was then rational, and was complaining of his head. Could not say when the scars were made on his head ; expects they were made before July was a year ago ; cannot say they were.

Re-examined by the State.—It is in a person's power to deceive a physician, as to his condition, by stimulants, &c. Defendant was chained in the jail when witness saw him ; did not seem to have taken violent exercise. The scars are so located on the head, that the depression of the skull might have affected the brain. Does not recollect that he noticed that defendant was intoxicated in the jail.

Re-examined by Defendant.—A person pre-disposed to insanity, by pressure of the skull on the brain, more affected by excitement which causes the blood to terminate to the brain.

Eli W. Gladden, sworn, says : Previous to the killing, witness and defendant had a conversation near the place where Cole caught Thompson and his wife together, and defendant said to witness, do you think Cole ought to kill Thompson ? Witness said no ; and he then said, do you think if you had been Thompson, you would have left the country ? Witness said he thought not ; defendant said no, nor he would not ; he would have killed or been killed. Defendant then said he liked Thompson very well, for the acquaintance, and was rather a crony with him ; and said Cole shall not kill Aleck Thompson in his presence, for he would be God-damned if he did not kill Cole first. Witness took defendant to be quick of comprehension ; was quick spoken, and never saw any evidence of insanity ; was frequently with him.

George B. Lassater sworn : Knows the night Dr. Gordon was called into the jail to see the defendant, the time testified to. Witness kept grocery that day, and defendant's brother-

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in-law, Mr. Fair, bought two or three pints of liquor, and witness saw them pouring the liquor into the jail at the grates to defendant. They said they poured it in through a cane. The liquor was poured in during the day and Dr. Gordon was called in at night following.

Here the State rested.

Evidence for Defendant.

Isaiah Mucklehanan, sworn: Was present and saw Mitchell shoot Cole, and saw Cole running after Thompson with a pistol in his hand. He fell at the crack of the gun. Witness stepped it. Defendant shot 47 steps. Does not know how and why the difficulty occurred. Thompson had been at the grocery an hour or two before the difficulty. Witness was in the house and did not see Thompson with a gun. Witness saw Cole have the revolver or repeater in his hand. As Mitchell shot, Cole was either turning or trying to fire at Thompson. Had been acquainted with defendant five or six months. Had known Cole six or seven years. Had previously heard Cole swear he would kill Thompson on first sight, or he should kill him. This was several months previous to the difficulty. Cole had moved some twelve or fifteen miles from where he was killed, some two or three months or more, before he was killed. Cole told witness he saw his wife going to meet Thompson; that he did not at first suspect anything wrong till she tried to hide; he then told her to go on, he knew what she was up to, that she should not be disappointed. Witness knows nothing of Mrs. Cole's character; it was the opinion of the neighbors, that she had been too friendly with Thompson, but with no one else. Cole was not informed of the reports in the neighborhood about Thompson and his wife till after he saw what he did, above stated, and it was after this that the threats were made.

Cross Examined.—Cole gave as a reason why he was going to kill Thompson, that he was too friendly with his wife. Cole made the threat the next day after he caught Thompson

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and his wife. Cole said he was following on and found Thompson lying on the ground, and Cole said he pulled out his knife and drew it across Thompson's throat, and told him he had a good mind to cut his throat, and that Thompson run. At the time of the shooting, Connelly was ahead of Thomson, running. Cole said afterwards, that his pistol would not fire. Mitchell left. Witness that night heard of his being seen. After that night, he was there no more till brought back from Duck Town. Heard him talking the night he left, when some men were in pursuit.

John S. Stewart sworn: Was present at the grocery when Cole came. He was asked to light and go in and take a dram. He went in. Mitchell followed him in. Witness does not know what was done in the house. Cole came out and took Mr. Hunt out and talked to him. Mitchell went up near and stood with his gun on his arm, and his hand on the cock. Cole then got on his horse and rode towards Thompson and Mitchell. Witness saw Cole put his hand in his saddlebags and put it on his pistol. Not a word was said, till Thompson, who was behind a tree snapped at him. Cole could have seen Thompson. He dodged round the tree a time or two, and then run and Cole after him. When the gun snapped, as Cole drew out his pistol it fired. Does not know that Cole had his pistol cocked when he started.

Cross Examined.—Witness is cousin to Thompson. Thompson had witness' brother's gun; had it probably half an hour. Thompson was never in the house after Cole came. As soon as Cole got his horse, Mitchell told Thompson to shoot him, as his intention was to kill him. Cole made no effort to draw his pistol till Thompson snapped at him. He did not have time to spring the triggers and cock the gun after Cole started to go to them; had it cocked before.

William S. Thompson sworn: Was present at the time of the difficulty. Did not see the shooting. Saw Cole put his hand in his saddlebags and draw his pistol and cock it

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in presence of Thompson. Thompson is son of witness. Cole came to the house of witness ten or eleven months before the difficulty and said he intended to have the life of Thompson. Thompson left and was gone ten or eleven months; his sister was taken sick and witness asked Cole if he might come home, he said yes; he afterwards came to the house of witness with a repeater that fired six times, and said nothing would satisfy him but his life; Thompson was not then there, he had come and was gone back to Tennessee.

Cross Examined.—Cole gave the leave to Thompson to come home; he came and stayed one night and then went back because he was hired in Tennessee at the Steam Mills. The time Cole came with the pistol, he did not hear the remark above stated, but only has what his children said about it; (his statement above not correct as cross examination showed.) He then said Cole made the remark at another time. The statement a little tangled.

John Fair sworn: Has known defendant between three and four years. Knew of his having been hit on the head two licks with a rifle gun by a man named Cruise. He was never out of his head before; has been occasionally since. He was confined two or three weeks at the time. He has at times been worse and at times better. Witness was afraid to be about him sometimes. He was inclined to sleep off the spells if not disturbed, if so, he was cross and angry. These spells came on once a month. He received the blows on the head two or three years ago. He would complain of his head a day or two before the spells would come on. He would remain in that condition when thus affected, one, two or three days. Has been in the woods with him at times when he was sensible as common, at other times wild. On one occasion, in the woods, he said he was lost about one quarter of a mile from home, and he threatened to kill witness if he did not take him home. The night before the killing, defendant's mother sent for witness and his wife. They went to her house; when they went, his mother had'

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him tied on the bed. He waked and asked witness why he had him tied; he told him his mother had it done for fear he would hurt her. He seemed satisfied and witness loosed him, and he went to sleep and witness and wife went back home. Witness went back after he got breakfast. Defendant had not still eat breakfast. He asked witness to go with him and kill a squirrel, that he could probably eat it. They went but did not find a squirrel, and they concluded to go to the grocery and get a dram. They went; defendant got to drinking and would not go home. Witness left him at the grocery, and the next he heard from him he had killed Cole. Defendant was not in his right mind that morning; he did not look natural or appear natural. He had drunk none the day before as he knew of. The night after the killing, witness saw defendant at his mother's in a fence corner asleep. On Sunday morning he waked up and seemed reasonable, and his mother told him he had killed Cole. He said, Lord have mercy, he hoped not. His mother persuaded him to leave.

Cross Examined.—He slept in the fence corner all night; they wrapped him up with quilts, and did not wake him up; he stayed there till morning. The time his mother tied him, he was asleep. Witness is brother-in-law of defendant. The neighborhood knew nothing of his condition. The old lady kept it from the neighborhood. The spells came on him about the quarter before the full moon. Witness says defendant had not drunk a drop the day before; then says he was with defendant most of the day only. Defendant, a good hand to work, sometimes got a little drunk, always knew his business. Witness gave defendant a dram in the jail the time testified to by Lasseter; only bought one pint and gave him some in a vial tied to a switch. His story was not gotten up about the insanity for the purpose of this defence. They never let any of the neighborhood know it, as he was all the help his mother had, and they were afraid he would be sent off. Witness was not afraid to leave him at

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the grocery ; did not suppose he would get into a difficulty.

Martha Mitchell, mother of defendant, sworn, says: He was a smart sensible boy till Cruise struck him with the gun, and killed him for a while. She says, Cruise broke the gun off at the breech and bent the barrel nearly double. It was done two years ago last Christmas. Defendant never appeared to her afterwards to have a constant good mind as he had before. The spells would commence by headache, &c. The spells came on about the last quarter of the moon. He looked purple in the face at these times. She never let it be known because she had no other help, and he was a good hand to work. If he was not excited, he slept it off. Sometimes he would say he was going to leave, and would put some of his clothes in a sack and start off and go about one hundred yards and go to sleep and come back and say he had been gone two or three weeks to Chattanooga, or somewhere else at work. He had been in one of these spells the night before, and had taken his carpet sack and had gone and left it at Wardlaws, and he said he went fifteen miles and back. She frequently bled him and thinks the spells did not then go as hard with him. She had tied him the night before for fear he would do wrong. She did not want him to leave home next morning. He came home after the killing, a while after dark. He slept in the corner of the fence. She told him when he waked that he had killed Cole, and he said, Lord have mercy upon me, I have not done it. He would go to sleep again, and wake up, and she would again tell him, and he would again repeat the same answer and go to sleep again.

Cross Examined.—He at times drank too much. The drinking of spirits never had any effect in producing these spells. He came home the night of the killing, just after dark. They did not tie him at the fence on the ground. Fair and his wife, and witness and her daughter, were all there. She covered him up in the fence corner. She supposes they all could have got him to the house. He waked

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up occasionally. Could have walked to the house. She cared but little for him that night. He lay less than ten steps from the house that night. He did not leave till towards night next day. She hid him about in the ridges and in the bottoms and about. She stayed with him all day Sunday and until just before day Monday morning, she left him half a mile from her house. She does not recollect that she made any effort to get him into the house, the night he slept in the fence corner. She lived about three-quarters of a mile from Mr. Mucklehanan. She covered him up the night he lay there.

Sarah Cope, sworn: Says she has known Mitchell four or five years. He had a stroke on his head about two years. She did not see it done. Saw it directly afterwards. She stayed at his mother's house about one year after it was done, and she left. He occasionally had bad spells of his head and would ask his mother to walk with him. She would do so. He often said after he was struck with the gun that he did not feel right.

Cross Examined.—He has sometimes drunk liquor. She has known him have these spells when he had not been drinking. She is no relation. She now lives at Ringgold, at Mr. Overbee's. She never knew his mother to tie him while she stayed. The old woman never told witness she did not want it to get out that he was in that fix. She never spoke of his condition in the neighborhood. She never heard his insanity talked of in the neighborhood.

Mrs. Margaret Fair, states the same as the two last witnesses, about the wounds on the head and his derangement, &c. That he cursed her at her own house. She did not see him on the day of the difficulty till night. She thinks he was worse than usual the night before the difficulty.

Cross Examined.—Every spell he had was a good deal worse; not so bad at first. She saw him the night after the killing, lying in the fence corner. He was at her house on Friday to dinner. She was at home on Thursday and Fri-

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day nights before the difficulty. She had not seen him from the time he eat dinner there on Friday, till she saw him after the killing. She is sister of defendant, and is wife of witness, Fair, who has been examined.

Here the evidence closed on the part of the defence.

The State in reply.

Isaiah Mucklehanan reintroduced, says: He saw several men in pursuit of defendant the night after the killing, after dark, and heard defendant ask them why they were following him about, and said, if they did not cease to follow him he would cut them into mince pieces. It was defendant's voice he heard. He saw defendant that day drinking; nothing in his appearance that indicated insanity. Lived in half a mile of the mother of defendant at the time.

Alfred U. Hunt, sworn, says: At the time Cole and witness were talking aside, a little before the killing, Cole said to witness, there was one damned rascal there he thought he would kill that day. Defendant was not near at the time. He afterwards came near, and stood with his hand on the cock of his gun, and Cole then said to witness, I suppose you know who it is. Witness said he supposed he did. Mitchell was near by and Cole said, I will go and talk to him about it; meaning he would talk to Thompson about it.

Israel Nations, sworn, says: He had seen defendant at gatherings about, for four or five years. Defendant had been at witness' house and witness at his; lived part of the time three miles off, and part of the time two miles. Witness regarded him a man of ordinary mind; never saw any evidence of insanity. He was often in liquor, and was then ill-grained, if crossed any way; if not, he was rather good natured. He lived some three miles from witness when he got hurt. Heard that defendant occasionally had bad spells while he was having his wounds healed and afterwards. Had not seen much of defendant for the last six months before the killing. Here the State closed.

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Defendant introduced in rebuttal:

William Duke, who states that he is jailer, and that defendant since he has been in jail has had several spells. The first was the night that witness sent for Dr. Gordon. He had other spells but not so bad. That night he was asleep when witness went to the jail. He waked up in a rage and did not seem to have much sense. Another time when witness had a runaway negro in the jail, he got into a spell, and witness carried them both up stairs in the prison, for fear of some injury; has seen no signs of it lately.

Cross Examined.—Defendant was put in jail the first day of August was a year ago. Has not known of his having but three spells; knows not whether these spells were feigned. He had whiskey in the room. He has had whiskey whenever he wanted it. Does not know how often Fair poured liquor in through the cane since that time; and since witness took the cane from him. He has had a switch in the jail with a vial tied to it.

Here the evidence on both sides closed.

The presiding Judge, in his charge to the jury, referred to the position assumed by prisoner's counsel that they were the judges of the law and the facts, that counsel said he did it respectfully. The Judge said he did not know what counsel meant—that he would not charge counsel with intentional disrespect—that it was true, that by virtue of our statute, they were the judges of the *law and the facts*; that it was the duty of the Court to give them the law as he understood it, and that it was also true as stated by the counsel; that the Court was responsible to the Supreme Court, if he committed an error; that he was a fallible being and liable to err, and that they might, under the statute, decide against his opinion of the law, if they thought proper to do so. To which charge counsel for the prisoner excepted.

The presiding Judge charged, that prisoner had the right to kill, to prevent the commission of an atrocious crime, as murder, manslaughter or the like upon another, but he must

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have acted in good faith, and must first have used all reasonable means in his power to prevent the perpetration of the crime; that if after using all reasonable means in his power to prevent Cole from killing Thompson, he was unable to prevent it otherwise than by killing Cole, he had a right to do so, provided he acted for the public good, or to say the least, he must have acted in good faith, but that this principle of law would not avail him if he acted in concert with Thompson in bringing about the difficulty—took part in the quarrel—made himself a party to it, and aided and assisted in bringing about the fatal rencounter. To which charge, prisoner's counsel excepted.

Upon the subject of doubts, being requested by the prisoner's counsel to charge, the presiding Judge read them a portion of the decision of the Supreme Court, as his charge on this subject, *vol. 6 Geo. Rep.* and concluded by saying to the jury that their minds and consciences must be satisfied of the guilt of the prisoner, *beyond the possibility of a reasonable doubt*, or that it was their sworn duty to acquit; but the doubt must be a reasonable one. To which charge prisoner's counsel excepted.

The Court said to the jury, that they were not to permit their sympathies to have any thing to do with their verdict. That they must meet out even handed justice between the parties, and if you convict the defendant when you are not satisfied of his guilt, and should he be innocent, remember that you are guilty and that his blood will rest upon you. On the other hand, if he is guilty, and you are satisfied of that fact, and acquit him, remember not only that you offend against the majesty of the law, but that the blood of a deceased fellow being cries to you from the ground. He who thundered from Sinai, "Thou shalt not kill" has also said of him who commits wilful, revengeful murder, "Thine eye shall not pity him"—"Thy life for the murderer's life if he escape." You will therefore, gentlemen, divest your minds of all prejudice and bias, and weigh this case deliberately,

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calmly and dispassionately, and in the fear of God render your verdict according to the honest dictates of your consciences, and leave the consequences to themselves. To which charge prisoner's counsel excepted.

The jury found the prisoner guilty. After they returned and were seated and before the verdict was received, the Court asked prisoner's counsel if he desired to poll the jury, who replied that he did not. The Court then asked if he knew any reason why the verdict should not be received, to which he replied that he did not. The verdict was then received and read. The Court then discharged the jury and they dispersed. The Court remembering that the jury had not been called over each by name, before the verdict was received, had them all re-called within a few minutes after their discharge, and the Clerk called over the names of the jury. They all answered. The Court, then swore each juror to make true answers to such questions as should be asked them by the Court or its authority, and examined each one separately, who answered that he was one of the jurors who tried the case; that he was in the jury box when the verdict was read in open Court; that he heard it read; that it was a verdict of guilty of murder, and that he agreed to the verdict, as a juror. To which proceeding prisoner's counsel excepted.

A. R. WRIGHT, for plaintiff in error.

UNDERWOOD, representing the Sol. Gen., for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first objection in this case is, that the presiding Judge made out, himself, the bill of exceptions.

It is certainly the privilege of the party who complains of the judgment in the Court below, to make out and present to the Judge, who presided in the cause, his bill of exceptions.

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If it be consistent with what transpired in the cause, in other words, if it contains the truth, the whole truth and nothing but the truth; and all the evidence material to a clear understanding of the error complained of, it is the duty of the Judge to certify and sign the same. If the bill of exceptions is not true, and sufficiently fully so as to present the points fairly, the Judge may refuse the same; or suggest to the party, the defects, so that he may amend the bill of exceptions himself, or the Judge may do it, and the party complaining may rectify his own bill, or accept it as altered by the Judge, as he may see fit. Having accepted and presented the bill of exceptions as made out, we must act upon it, and we do not recognize this ground, therefore, as good on a motion for a new trial. If the party is dissatisfied, a different course altogether should have been adopted.

[2.] The second objection is this: A motion was made by the prisoner to continue the cause, on account of the absence of Sarah Cope who was alleged in the showing, to be a material witness for the accused; that by defendant's direction a subpœna had been issued for her, and placed in the hands of the Sheriff, who stated that he had left the same at the last most notorious place of abode of the witness. The witness, it turned out, upon further inquiry, lived in Ringgold, Catoosa county, about 20 miles off, and not in Walker county where the trial was pending. She had removed several months before the subpœna was left at her former residence. The Court overruled the motion, for the reason that due diligence had not been used to procure the attendance of the witness. Some fifteen months had elapsed since the arrest of the prisoner, and it did not appear that the materiality of this testimony had come but recently to the knowledge of the accused. The Court stated at the same time, that he would dispatch an officer after Miss Cope, and have her at Court by the time she was needed; accordingly she was brought, and was in attendance most of the day before she was examined.

Admitting that the Court was wrong in holding that due diligence had not, under the circumstances, been shown to procure the testimony of the witness, which we do not, the error was abundantly atoned for by what subsequently transpired. The witness testified in behalf of the defendant on the trial; what more could he ask ?

[3.] The application being rejected, the Court announced that, "the trial must proceed," and this last expression, as well as the manner of it, constitutes the third exception, and if there was anything wrong in the expression it certainly must have been in the manner of uttering or emphasizing it, and of this we are incapable of judging, and not in the language itself. The motion to continue being overruled and the defendant's counsel referring to the written affidavit and saying, "This is our showing." The Judge responds, "The trial must proceed." Court and counsel seem to have been equally impressive in announcing their respective determinations.

Counsel now complain that conceding that the showing made was insufficient or obviated by the promise of the Court to send for Miss Cope; that they were cut off from making any further attempt to continue the cause, by the solemn declaration, that the cause *must* proceed.

They were precluded by the 53d Common Law Practice, from amending their showing. It provides that, "all grounds of motion for nonsuit, in arrest of judgment, and for *continuance*; all objections to testimony, and all exceptions to declarations, must be urged and insisted upon *at once*, and after a decision upon one or more grounds, no others, afterwards urged, will be heard by the Court." 2 *Kel.* 476. Besides, the only other ground suggested in the argument is, that it might have been made to appear that the public prejudice was too much aroused to admit of an impartial trial; sufficient time had elapsed to allow this excitement to subside, and no continuance could have been granted on that account.

[4.] The fourth objection is, that the Court itself perform-

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ed the duties of the Solicitor General in "requiring" of the prisoner,—1st. A waiver of the arraignment; 2d, of a copy of the bill; and 3d, of the list of witnesses.

The Court did not "*require*" of the prisoner to do this, but *inquired* if he would? and to which *inquiry* the counsel for Mitchell answered affirmatively.

We see no error in this.

[5.] The fifth objection is, that the Solicitor General being unable, from indisposition, to perform his duty, the Court appointed Judge Hooper, a gentleman of acknowledged unexceptionable character, to officiate in his place.

The State must not go unrepresented, nor the criminal jurisdiction fail for want of a prosecuting officer; and if in the opinion of the Court, the States Attorney is unable from sickness, or any other malady of mind or body, from discharging his duty, it is not only the privilege, but the imperious duty of the Court, in the true spirit and intent of the Act of 1799, (*Cobb 574*.) to substitute another in his place.

[6.] As to the sixth objection, that one of the empaneled jurymen was permitted to aid the State in selecting the jury: the Judge certifies that he did not witness the impropriety complained of; and that had it come to his knowledge, it would have been rebuked. Prisoner's counsel made no objection at the time; and when Gladden, the juror was sworn, he disqualified himself, and was set down for cause, without having been put upon the accused.

[7.] The seventh objection is, that after the Solicitor General had asked the questions required by the statute, in making up the jury, the Court repeated the questions, frequently eliciting answers tending to prejudice the prisoner.

No doubt jurors frequently misapprehend the meaning of the questions propounded under the statute, and when put in the form therein prescribed, "Have you, from having seen the crime committed or having heard any part of the evidence delivered on oath, formed and expressed any opinion in regard to the guilt or innocence of the prisoner at the

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bar?" perhaps the juror answers in the affirmative. But separate the members of the sentence, and repropound the questions, Did you see the crime committed? Have you heard any portion of the evidence in this case, delivered on oath? perhaps the juror will reply in the negative to both of these interrogatories, thereby evincing he did not understand the question as originally asked. That jurors frequently fail to comprehend the true import of the question put to them, under the law, to test their indifferency, there can be no doubt; and that the Court should interpose to prevent mistake in this matter, there is just as little.

[8.] The eighth objection is, that the Court erred in taking down the testimony himself and in not having it done by another; and in omitting to take down a part of the proof.

If the Judge see fit to perform this service, the accused has no right to object, In taking down the testimony of Wm. S. Thompson, Judge Brown forgot, for a moment, his character as amanuensis, and as *Judge* says, "his statement above not correct as cross examination showed." He adds, "the statement a little tangled." While acting as amanuensis, he should confine himself strictly to that character, still this inadvertance is no ground for a new trial.

[9.] The ninth objection is, that the Court erred in replying to the argument of prisoner's counsel, in its charge to the jury, and manifested displeasure thereat, while it admitted the correctness of his position.

This complaint is not sustained by the bill of exceptions, and we dismiss it with the single remark, that all reference to the Supreme Court, either by Court or counsel, by way of menace or otherwise, except to cite its decisions, had best be dispensed with.

[10.] The tenth objection is, that while the Court stated the law correctly, namely, that the jury were the judge of the law, as well as of the facts, yet it so stated it as to destroy its force and defeat the object of the law.

This objection is not supported by the bill of exceptions.

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We must say, however, in all kindness, that Courts acknowledge this right too grudgingly to the jury. We commend to their consideration what this Court has said upon this subject in *Keener vs. The State*, 18 *Ga. Rep.*, 194.

[11.] The eleventh assignment, that the Court stated to the jury, that if it erred, it was responsible to the Supreme Court, is included in the 9th.

[12. 13.] It is complained of in the next place, that the Court in charging the jury, that while one person has a right to kill another, to prevent the commission of an atrocious offence, he must use all reasonable means to prevent it, and that it must have been done for the public good.

The charge as given was this, "that prisoner had the right to kill to prevent the commission of an atrocious crime, such as murder, manslaughter or the like, but that he must have acted in good faith and used all reasonable means in his power to prevent the perpetration of the crime. But that this principle could avail the prisoner nothing if he acted in concert with Thompson in bringing about the difficulty; took part in the quarrel; made himself party to it; and aided and assisted in bringing about the fatal rencounter."

We do not think the prisoner has any cause to complain of this charge. Concede the common law doctrine, that homicide is justifiable for the prevention of any forcible and atrocious crime, must there not be an apparent necessity, on the part of the slayer—yea, an absolute necessity for the act—to make the killing justifiable? And must it not have been done, *bona fide*, to save life, and not wantonly or wickedly to destroy it? Under the pretext of punishing a felony, had Mitchell, the author and finisher of this whole tragedy, the right to kill in a spirit of revenge, and in the execution of a pre-conceived plan and purpose? Upon the proof in this case, does this killing stand upon the same footing of reason and justice, as that of a woman who kills another to save her person from lustful violence? And ought not the Court, in stating the principle, have qualified it as he did? Had

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he failed to do so, the grossest abuse of a very delicate doctrine would have been the inevitable consequence. Is it probable that Cole would have killed Thompson, had he not been shot by Mitchell? There was a time when trespassers in aristocratic parks might be slain, provided they refused, upon summons, to surrender themselves to the keepers. That day is past. The law is more tender of human life. But even under the statute *de malefactoribus in parcis*, it was incumbent on the keeper to show, that the deer-stealers could not but escape unless they were killed. The burden is upon the defendant in this case to show that he was without fault on his part. The he *killed to prevent murder*.

[14.] The next error complained of is, the Court's charge upon the subject of doubts: first, in referring to counsel's speech; and secondly, in not sufficiently charging upon this subject.

The Judge certifies that he charged the jury in the very words of the Supreme Court, in *Giles vs. the State*, (6, *Ga. Rep.*, 276,) as to what kind of doubts should justify a jury in acquitting a prisoner; and if so, he ought not to be reversed by this Court. After all the exposition by text writers, and illustrations by this and other Courts, the simple rule is, that jurors must not convict without plain and manifest proof of the prisoner's guilt. And that intrusted as they are with the administration of public justice on the one hand, and with the life, the liberty, and the honor of the prisoner on the other, their duty calls on them, before they pronounce a verdict of condemnation, to ask themselves whether they are satisfied, beyond a reasonable doubt, that the accused is guilty of the charge alleged against him in the indictment.

And when the Court has said this, it has probably said enough, both as to the rule of evidence, as well as the duty of the jury, in the performance of their important functions.

[15.] As to this complaint, that it appears from the whole mode, that the conduct of the Court may have damaged the

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prisoner, and prevented him from having a fair trial, it is too vague and indefinite. It presents nothing tangible.

[16.] The sixteenth objection is, that the jury was not called on, when it came into the box, to return its verdict, and the case of *Settle vs. Alison and others*, (8, *Ga. Rep.*, 208,) is cited in support of this assignment.

This Court held in that case, amongst other things, that where a jury had rendered an imperfect verdict by not finding all the issues submitted to them, that after the verdict had been received and recorded, and the jury discharged from the further consideration of the cause, that it was error in the Court, after the expiration of four days, to re-assemble the jury and amend the verdict, according to what the jury *then stated* it was their intention to find, such intention not appearing on the face of the verdict.

Here the jury returned into Court, with their verdict, finding the defendant guilty of murder; when they were seated in the box, and before the verdict was received, the Court asked defendant's counsel if he desired to poll the jury? To which he replied he did not. He was then asked if he knew of any reason why the verdict should not be received? He answered he did not. The verdict was then received and read, the twelve jurors sitting in the box. The jury were then discharged from the further consideration of the case. The Court recollecting, after their dispersion, that the jury had not been called over, each by name, when the verdict was delivered, had them re-assembled, within from five to ten minutes, an oath was administered, and each juror swore that he was in the box when the verdict was read in open Court; that he heard it read; that it found the defendant guilty of murder; and that he agreed to it.

The statement of the case, not only acquits the Judge of the error reputed to him, but makes manifest the *tota caela* difference between this case and the precedent referred to.

[17.] The last assignment is in these words: "The jury in criminal cases, being the judges of the law, as well as of

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the facts, when they misapply the law to the facts, and find an erroneous verdict, according to the facts, a new trial ought to be granted; and the jury did so find in this case."

Without stopping to controvert the proposition thus assumed, but which we must be permitted to say, is scarcely deducible from *Colquitt vs. Thomas et al.*, 8, *Ga. Rep.*, 258, certainly not in the amplitude in which it is stated, we are constrained to dissent from the conclusion, to which the learned counsel comes, that the verdict of the jury was contrary to the law and the facts of the case. There was, to say the least of it, ample testimony to justify the finding. Indeed, after a calm and dispassionate, and careful examination of the evidence, we must say, that, had we been in the place of the jury, we should have rendered the verdict which they did.

Judgment affirmed.

No. 45.—JOHN WOODRUFF, plaintiff in error, vs. JAMES
WOODRUFF, defendant in error.

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- [1.] It is no error that the Court refuses to give requests in charge to the jury, if there is nothing in the evidence to authorize the requests.
 - [2.] A charge that cannot possibly operate "against" a party, cannot be made the ground for a new trial, even under the new trial Act of 1854.
 - [3.] In a suit for malicious prosecution, proof that the grand jury returned "no bill on the indictment, is sufficient proof *prima facie*, of the termination of the prosecution.
 - [4.] And in such a suit the plaintiff may examine the Solicitor General, as to whether the prosecution was renewed or not.

Malicious prosecution, in Fulton Superior Court. Tried before Judge HAMMOND, at October Term, 1856.

This was an action for a malicious prosecution and false imprisonment, brought by James Woodruff against John Woodruff.

The defendant pleaded the general issue.

Plaintiff introduced the following testimony.

1st. The original affidavit and warrant charging plaintiff with an assault with intent to murder, with the entry of service thereon by a lawful officer.

2d. The original warrant of commitment under which plaintiff was imprisoned.

3d. The original recognizance for plaintiff's appearance at the Superior Court of DeKalb county, to answer said charge.

4th. A certified copy of the bill of indictment preferred against plaintiff for said offence at the April Term, 1853, of DeKalb Superior Court, with the entry of "no bill" thereon, signed by James Paden, foreman.

5th. *James Paden*, examined by commission.

First interrogatory: I know the parties.

Second: Was foreman of the grand jury of DeKalb county, at April Term, 1853, of the Superior Court. The annexed bill of indictment was the original bill and the entry of "no bill," signed James Paden, foreman, is in my own handwriting.

Third: When the return "no bill" was made, the defendant was a witness before the grand jury on the part of the State, and then testified that he went to the house of plaintiff, and plaintiff was in the field. Plaintiff went to the house, went in at the door opposite from defendant, came out with a pistol or short gun, and told defendant not to come any further. Defendant continued to advance and plaintiff told him again not to come any nearer, for he had been the cause of his family leaving him, and he did not want him to come about him. Plaintiff held the pistol in his hand, but did not present it. Defendant then "told plaintiff he had come after settlement, or some clothes, or something to that amount.

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Fourth: Knows nothing else that will benefit plaintiff.

Annexed to the answers of this witness, was the original bill of indictment preferred against James Woodruff, with the return thereon, of "no bill," signed by the witness as foreman of the grand jury of DeKalb county.

6th. *Allen Woodall*, examined by commission.

First interrogatory: Knows the parties.

Second: Knows that plaintiff was confined in the jail of DeKalb county in 1853, from 10th May to 21st June, charged with an assault with intent to murder, under a warrant issued at the instance of defendant. Witness was then the jailer of DeKalb county.

Third: Knows that plaintiff sent for defendant to come and see him, while in jail. Plaintiff applied to defendant to let him out of jail.

Defendant proposed to let him out, provided he, plaintiff, would leave the State.

Fourth: Knows nothing else that will benefit plaintiff.

7th. *John T. Sanders*, sworn, says: The defendant came to his house and asked him to go with him to plaintiff's house, that he had a mortgage on plaintiff's horse and wanted it settled.

Witness started on with defendant. On the road they met Mr. Embry, Embry told them not to go, that plaintiff was mad; urged them; said if they went, plaintiff would shoot defendant. Defendant replied, 'that there was no danger, and persuaded witness to go on; that when they got there, plaintiff would not say a word; that he could take him by the hand and hickory-whip him. Witness and defendant then went on, and Mrs. Casey and plaintiff's wife then persuaded them not to go to plaintiff's, saying that plaintiff was very angry with defendant.

Defendant still insisted that witness should go with him, saying there was no danger. When they got within one hundred and fifty or two hundred yards of plaintiff's house, one of plaintiff's children ran to tell plaintiff, who went into the

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house and got a pistol, and came out with it in his hand, arm down by his side, and hollered to defendant to get out of his inclosure; not to come any nearer. Witness and defendant went on down the path towards the house, and where plaintiff was standing. When within twenty-five or thirty steps of plaintiff, who was standing in the edge of his yard, and in the path they were coming down; plaintiff raised the pistol, throwing the barrel in his left hand, and the pistol was pointed up the path in the direction of witness and defendant, and said, "John stop and get out of my inclosure, if you come another step I will blow a day-light hole through you;" witness then, as quick as lightning, put his hand on the shoulder of defendant and told him to stop, which he did; witness then went off a piece and sat down on a stump. After a while, plaintiff called him; witness went to him and they talked a good while. In the conversation, plaintiff said to defendant, "John, you are the cause of my wife and children leaving me;" defendant replied, "James, you know that is not so," that ended the conversation on that point. Witness then came back to defendant and told him that nothing could be done with plaintiff; defendant left with him. While there, and in going away, defendant was cool, and did not do or say anything out of the way. Defendant said to witness, that one motive he had in going to plaintiff's was to get him to let his wife and some of his children, who were then away, come home. Talked with him before they went on the road, and whilst there to plaintiff, as much about that as the mortgage. Plaintiff said he was willing to pay the mortgage. The pistol was a large rifle-bore, and at the time it was raised up and pointed down the path toward them, they were in carrying distance; thinks the pistol could shoot further than where they stood, and would kill.

8th. *L. E. Bleckley*, sworn: Has been Solicitor General of the Coweta Circuit since Nov. 1853; has attended every Superior Court in DeKalb since that time; has had no application to make out an indictment in the case which plaintiff

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was arrested in ; has no recollection of any indictment pending against plaintiff in that Court ; feels confident there is none.

9th. *William Ezzard*, sworn : Was employed by plaintiff to defend him ; thinks no order of discharge was taken upon the return of " No Bill," by the grand jury.

Plaintiff closed, and defendant introduced no testimony.

Counsel for defendant then requested the Court, in writing, to charge the jury, among other things, as follows :

1st. " That if the pistol was held in one hand or in both, the muzzle pointing down the path towards the defendant, the parties being near enough each other for a shot from the same to take effect; and if the plaintiff, while so pointing the pistol, threatened to shoot defendant if he did not stop, and defendant did stop and thereby prevented the shooting, then the assault was complete ; and it was an assault with intent to murder, provided the killing of defendant, had it then and there taken place, would have been murder, and not a lower grade of homicide."

2d. " That such killing would have been murder, if provoked, merely by defendant being in the path inside of plaintiff's inclosure, and advancing towards the plaintiff's house, provided he was there with no intent to do an injury, and was making no hostile demonstration."

3d. " That if there was a mortgage or any other matter of business between the parties to be settled, defendant had a right to go to see plaintiff about it, at his own house or any where else in a peaceable manner, and to insist, in a respectful way, upon having a friendly talk with him on the subject."

4th. " That if the defendant was going peaceably to see the plaintiff on lawful business, was decent and orderly in his behavior, and was met by plaintiff with a deadly weapon, the weapon pointed down the path towards him within carrying distance, and if the plaintiff then threatened to shoot

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him, or make day-light show through him if he went another step, and the defendant had to stop to keep from being shot, there was probable cause for the prosecution."

Each and all of which charges the Court refused to give, *in the language requested*, and counsel for defendant excepted.

But the Court charged the jury, among other things, that, "the finding of 'no bill' by the grand jury of DeKalb county, with the lapse of a reasonable time, and no attempt to prefer another bill of indictment, would be sufficient to show *prima facie* that the case in which the arrest was made had ended, although a recognizance for plaintiff's appearance to answer the charge, might be still outstanding, and no order of Court had been granted for his discharge." To which charge and every part thereof, counsel for defendant excepted.

The jury found for the plaintiff, five hundred dollars; and counsel for defendant moved for a new trial, on the ground that the Court erred in refusing to charge the jury according to each of the several requests hereinbefore mentioned; on the ground that the Court erred in charging the jury as above specified; on the ground that the verdict was decidedly and strongly against the weight of evidence; and on the further ground that the Court erred in admitting the evidence of L. E. Bleckley and William Ezzard against the objection of defendant's counsel, said counsel having in fact objected to said evidence, and every part thereof, as irrelevant, and as proving by parol what could be shown by the records of DeKalb Superior Court, at the time said evidence was offered and admitted. The Court overruled the motion for a new trial, and counsel for defendant excepted.

OVERBY & BLECKLEY, for plaintiff in error.

CALKOUN & GARTRELL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Ought the Court below to have given the *requests* in charge to the jury.

If the evidence proved there was *no assault*, the requests were merely irrelevant. And we think that the evidence did prove that there was no assault.

This was the evidence :

1st. The testimony of Paden, the foreman of the grand jury, to the effect, that the prosecutor, on his examination before the grand jury, swore that the accused "held the pistol in his hand, but did not present it."

2d. The testimony of Sanders, who swore, that when he and the prosecutor got "within twenty-five or thirty steps of" the accused, "who was standing in the edge of his yard, and in the path they were coming down," the accused "raised the pistol, throwing the barrel into his left hand, and the pistol was pointed up the path in the direction of" him, the witness, and the defendant, "and said, John, stop, and get out of my inclosure, if you come another step, I will blow a day-light hole through you."

Does the act thus sworn to, amount to the *presenting* of a pistol? A pistol, or other gun, is not presented at an object until it comes to be held as it would be held, if the holder of it was going *to fire it at the object*. Now a pistol, with its butt in the right hand, and its barrel thrown across into the left, is not held as it would be held, if the holder of it were going to fire it at an object; and this even although the pistol may happen to be pointing at the object. A pistol thus held, is no more held as it would be, if the holder were going to fire it at an object, than is a pistol thrown over the shoulder, with the muzzle to the rear, held as it would be held, if the holder were going to fire it at an object. It can make no difference in either case, that the pistol may happen to be pointing at the object. To constitute the act of present-

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ing, *intention* must enter into the act. And in such case, intention does not enter into the act.

The evidence shows then, that there was not any presenting of the pistol; and if there was not any presenting of the pistol, it follows that there could have been no assault.

If there was no assault there was nothing to authorize the requests, and they were irrelevant. They went on the assumption that there was an assault.

[1.] We think, therefore, that the Court did not err in refusing to give them in charge to the jury.

This disposes of the requests to charge.

And what thus disposes of the requests to charge, must equally dispose of all the charges except one.

If the case, made by the evidence, was a case in which there was no assault, it was a case in which the defendant, the party alleging an assault, was not entitled to have any charge whatever given as to what might or might not constitute an assault. If the case proved was this, it was plainly one in which the *whole* defence had failed. And can any charge whatever given about a defence, be said to be "against" the defendant, when the whole defence has failed in the proof? Suppose no proof at all is offered in support of the defence, does the Court do anything that operates "against" the defendant, if it tells the jury that such or such things would constitute a defence, but that such or such other things would not constitute a defence? Surely not.

Still more must this be true, if evidence is introduced, and it actually *disproves* the defence. And in the present case evidence was introduced, and it did disprove the defence.

The charges, all except one, amounted to this, that certain facts, if they existed, would constitute a defence, provided certain other facts did not also exist.

The case, as proved, was one in which there was no assault, and therefore, was one in which there could exist no facts that would constitute a defence.

The charge, therefore, confined as it was to what was

or was not a defence, could not possibly be "against" the defendant.

[2.] Without expressing any opinion then, as to whether the charges would or would not have been good, if they had been called for by the case proved, we say, that as they were not called for by the case proved, we do not consider them to have been "against" the defendant, in the sense of the word *against* as used in the new trial Act of 1854; and consequently, that we do not consider them to be such that, on this account, that act requires a new-trial to be granted.

The excepted charge is as follows: "That the finding of no bill by the grand jury of DeKalb, with the lapse of a reasonable time, and no attempt to prefer another bill of indictment, would be sufficient to show, *prima facie*, that the case in which the arrest was made had ended, although a recognizance for plaintiff's appearance to answer the charge might be still outstanding, and no order of Court had ever been granted for his discharge.

[3.] We think that this charge was right.

Suppose the accused had been discharged from the recognizance; yet such a discharge would not have been a bar to a new bill of indictment; that is to say the discharge from the recognizance would have been no better evidence that the suit had terminated, than was the mere return of "no bill" by the grand jury. At any rate, that return was sufficient *prima facie*, *Pain vs. Porter*, *Cro. Jac.* 490; *Morgan vs. Hughes*; 2, *T. R.*, 225; *Vol. 2, Pt. 1, Saund. Plead. and Ev.* 325; *See 2. Green. Ev. Sec.* 451.

The plaintiff, in the suit below, wished to prove that the prosecution had not been renewed. And the Court permitted him to examine the Solicitor General, to show that he had no knowledge of any renewal of the prosecution. We cannot say, that we think this permission to have been wrong.

What the plaintiff had to prove was a negative, and it is impossible that a negative, i. e. a non-existence, can be *record-*

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ed. If so, it is not a thing of which any record can be direct evidence, much less can be the highest evidence.

[4.] We cannot say, therefore, that we think that there could have been offered any evidence of a better or higher *species* than that of the Solicitor General, which was offered.

Was the verdict decidedly and strongly against the weight of the evidence? We think not.

And this makes an end of all the questions in the case. The result is, that we think the judgment of the Court below ought to be affirmed.

Judgment affirmed

No. 46.—JOHN T. MEADOW, plaintiff in error, vs. JOHN BIRD, defendant in error.

[1.] A note given for professional services rendered by an attorney, on an application for a pardon to the Legislature, in explaining legal principles to the members, and in explaining testimony and arguing its legal effects in such language as one gentleman would use to another in discussing the merits of a subject, is not illegal, because contrary to public policy.

[2.] A note, illegal in the hands of the payee, because contrary to public policy, is not, therefore, void in the hands of a *bona fide* holder, being transferred before due, and for a valuable consideration; neither is it void in the hands of a holder as *collateral security for an existing debt*, provided it be transferred before due, and for a valuable consideration, and without notice of the taint in the consideration.—LUMPKIN, J.

W., an attorney, at the request of B., supported an application to the General Assembly for a pardon, by reading the testimony to individual members thereof, and by explaining and arguing to them its legal effect. B., in consideration of this service, gave W. his note. W., before the note fell due, transferred it to M., in payment of a debt he owed to M.—M. knowing nothing of the consideration.

The note was good as between B. & W.

But even if it was not good as between them, it was good as between B. and M.—BENNING, J.

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Assumpsit, from DeKalb Superior Court. Tried before Judge BULL, at October Term, 1856.

This was an action on a promissory note, brought by John T. Meadow, as bearer, against John Bird, maker. The note was made payable to one G. J. Wright or bearer, and by him transferred to plaintiff. The amount of the note was five hundred dollars, payable six months after date, and dated 23d November, 1853.

The defendant Bird, pleaded that the note was illegal and void, being given upon consideration that said Wright would go to Milledgeville during the session of the Legislature, and use his influence with the members, to obtain a pardon for Elijah Bird, the son of defendant, who had been convicted of murder, and was under sentence of death.

Wright was an attorney at law; Bird was pardoned by the Legislature. The note was transferred to Meadow before its maturity.

The presiding Judge charged the jury that it was against public policy for the Legislature to be influenced or controlled in acting on matters of public interest, by outside influence upon the members, procured to be exerted for hire; that if the consideration of the note was services to be rendered by Wright in influencing or attempting to influence the members of the Legislature, by personal solicitation or any such means, to vote for the pardon of a condemned criminal, it was absolutely void, and that it made no difference whether the person employed was an attorney or not; that the note, if given upon such consideration was *void* in the hands of the plaintiff, although he may have received it *bona fide, before due*, for valuable consideration, or as collateral security, and without notice of the illegal consideration upon which it was founded. To which charge plaintiff excepted. The jury found for the defendant, and plaintiff, by his counsel, excepts and brings his bill of exceptions, and assigns as error the charges aforesaid of the presiding Judge.

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T. W. J. HILL, for plaintiff in error.

HAMMOND & SON, for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

From the novelty of this case, in this State, I have looked a good deal into it, and am prepared to give my opinion respecting it. The facts are few and uncontradicted.

“I did render service for the same” (says Wright, who was made a witness by the *defendant*) “with various persons whose names are not now recollected by me in particular. The service was such professional service as an attorney would render in explaining legal principles to those unacquainted with them. I did not influence any person that I know of, though I used all lawful means to do so, with various members of the last Georgia Legislature, by reading testimony and explaining and arguing its legal effects to them. I do not recollect what was the precise language used, but it was such as one gentleman might use to another in discussing the merits of a subject.”

Here then, is the consideration of the \$500 note sued on, and given by John Bird to the witness, who was an attorney at law.

Upon this proof the Court charged the jury, “That it was against public policy for the Legislature to be influenced or controlled in acting on matters of public interest, by outside influence on the members, procured to be executed for hire; that if the consideration of the note was for the services of the payee, in influencing or attempting to influence the members of the Legislature by personal solicitations or any such means, to vote for the pardon of a condemned criminal, it was absolutely void, and that it made no difference whether the person employed was an attorney or not.”

To which charge counsel for plaintiff excepted.

The Court is unanimous in holding that, the judgment below must be reversed, upon the ground, that there was no

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evidence before the Court, that the services rendered were "to procure the pardon of a condemned criminal." The defendant had omitted to introduce any testimony to that point.

But supply this deficiency, for such no doubt was the fact, and what is the law of the case?

We are not the advocates or even the apologists of the evil intended to be rebutted by the instructions given by the Circuit Judge to the jury. We concede the fact, that there is too much reason to believe that legislation in this country has in some instances, been contaminated by sinister and selfish influences. *I do not speak of this State, for I know of no such instance.* But I am fully warranted in coming to this conclusion, in view of the painful exposures recently made in our national Congress; already has a class of persons been established at Washington City, and elsewhere, who make it a business to push through private claims and private acts *per fas et nefas*. How easy the transition from the compensation of agents, to the pay of members, late developments abundantly prove. The consequence is, a wide spread and growing suspicion of want of public morality in that branch of the government, without which the national fabric would crumble to ruins. No man sees more clearly or feels more strongly, the necessity and importance of preserving pure the fountain from which issues, not only all of our general laws, but, the innumerable private acts for railroad and banking corporations, pecuniary aid to associated enterprises, which grow with our rapid growth, and multiply with our rapidly increasing wealth and population. Still the question recurs, is *this contract* illegal and void?

It is admitted that it is untrammelled by authoritative decisions, and must be determined upon general principles.

It will be found upon examination, not only that the books are full of cases to this effect, namely: That the law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy,

sound morality or the integrity of the domestic, civil or political institutions of the State: But to come closer to the point at bar. It has been decided, and we will not say incorrectly, that a contract to procure, or endeavor to procure, the passage of an Act of the Legislature, by any *sinister* means, or by even using a *personal* influence with the members, would be void, as inconsistent with public policy and the integrity of a political institution: Nay, more: precedents are to be found, in which it is maintained, that any agreement for a *contingent fee*, to be paid upon the passage of a legislative Act, would be illegal and void; because it would be a strong incentive to the exercise of personal and sinister influences to effect the object.

Beyond this, the reported cases do not go; and none of the doctrines thus announced, embrace the case under consideration.

Wood vs. McCann, 6. *Dana's Kentucky Reports* 366, is cited not only by Chitty on Contracts, as a leading case in support of the doctrine, that contracts contrary to public policy are void; but it is referred to by most of the American Courts with approbation, who have had this doctrine under consideration, and was mainly relied on in the argument before us. Perhaps a stronger cannot be found.

There, as everywhere, the Court admitted the patent fact, that it was all important to just and wise legislation, and therefore to the most essential interest of the public, that the Legislature should be perfectly free from any extraneous influence, which may either deceive or corrupt the members or any one of them; an influence exerted too, not from public or patriotic motives, but from those which are altogether mercenary and selfish; and yet the Court held—though doubtingly it is true—that a declaration, averring in substance, that the defendant bound himself to pay to the plaintiff \$100 to attend the Kentucky Legislature, to get a bill passed legalizing the defendant's last marriage, and divorcing him from his former wife; and averring also, that the plaintiff did attend,

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and that at his instance and request, such an Act was passed and approved, whereby defendant was released from all liability, &c., does not describe a contract for a *contingent fee*, nor one so clearly *malum in se*, that the Court can pronounce it void and reverse a judgement rendered upon it by default. And the conclusion of the Court was, that jealous as the law and its judicial organs should ever certainly be of such contracts as that they were considering, still there was scarcely enough in the record to authorize the Court to decide, *as a matter of law*, that the note on which the judgment below was rendered, was given for an illegal or vicious consideration, and was therefore not *legally* obligatory.

Compare the facts in the case before us with this, and the contrast is striking. The services rendered by Wright and the influence used by him, was as an attorney at law, for a fee certain, in "explaining" to the *lay members* of the Legislature, "legal principles; and in explaining the testimony and arguing its legal effect to them;" and this in language "which one gentleman would use to another in discussing the merits of a subject."

This is the precise case made by the record. And it is obvious, whatever the further and future proof may be, that it is not a contract as it now stands upon Wright's testimony, to procure or endeavor to procure the pardon of a condemned convict, by any *sinister* means, or even by using a *personal* influence with the members; nor is the consideration *contingent* or dependent upon success.

Direct authority might be adduced from England in support of this contract. But I forbear, upon the ground, that learned Judges in this country have held, that it is unsafe to rely on a precedent coming from such a source, when we reflect upon the different manner of conducting business there and here. I need not specify them.

I know how economical the Legislature is of its time, still I am not prepared to say, that it would not be wise, in applications for a pardon, to allow feed counsel, without impro-

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priety, to prepare and present the petition before the Legislature, to make an exposition of the law and the facts, and to advocate the adoption of the measure; to be answered by the Attorney or Solicitor General of the Circuit where the trial was had; and in all private acts, to permit an appearance by attorney before the committees charged with the subject. To legalize such a system, would not only rid the Legislature of *lobby agents* and the swarms of hired retainers by which it is now surrounded; but would cause business to be conducted with more circumspection and candor; and not under those covert influences, so dangerous and detrimental, both to private rights and the public weal.

In the absence of any such provision, I cannot divest myself of the idea, that the services rendered in just such a case as this, should not go uncompensated. Suppose the maker of this note to be an aged and ignorant man. His son has been consigned to the gibbet by the Courts. His hope for life is in the pardoning power of the Legislature. It may be that evidence vital to the convict's case has been discovered since even the decision by the appellate Court; or some other thing occurred, which, in a civil case, would induce a Court of Chancery to interfere and grant relief against a judgment at law. It is important that the case in its new phase should be properly presented to the Legislature. Were the prisoner the son or brother or relative of a lawyer, who, with all his zeal for legislative purity, would say, that it would be contrary to sound morality or public policy, for this professional friend to aid and abet, to the extent that Wright did, in procuring the pardon of this kinsman? If there be such a man amongst us, he belongs to that age, when Brutus could sentence the child of his loins to the lictor's axe, and not to this, when justice is tempered with mercy. And if this would not be condemned, why may not this illiterate old man employ another to do that which he cannot have done otherwise, which he is unable to do himself, and which is in and of itself untainted with turpitude? The Legisla-

ture of this State saw nothing wrong in employing and paying liberally an agent to prosecute her claim upon the General Government. Why may not John Bird do likewise? Is money dearer than the life of a son? And if it should be said, that if we give countenance and a legal sanction to this attempt, which is an entering wedge, it is impossible to foresee the train of evils of which it may be the prolific parent. Our reply is, sufficient unto the day is the evil thereof: Every case must stand upon its own merits; and above all, the Legislature, always having truth and justice before their eyes, is abundantly able to protect itself. It would not be decorous in this branch of the Government to impute to that body, either the want of ability or inclination to do so. The result of our investigation upon this branch of the case is, that the services rendered by Wright, as testified to by himself, and for which the note sued on was given, were not of such a character as to compel this Court as a matter of law, to declare the contract illegal and void.

[2.] John T. Meadow, plaintiff in the action, testified, that in the forepart of the year 1854, Wright, the payee of the note, was owing him between two hundred and fifty and three hundred dollars. That Wright was not able to pay him, and placed in his hands John Bird's note for five hundred dollars, not then due. Witness took the note, and was to give Wright credit for the amount he owed him, and the balance pay over to Wright when collected."

The Court upon this evidence charged the jury, "that if Bird's note was given upon the consideration above stated, it was void in the hands of Meadow, although he may have received it *bona fide* before due for a valuable consideration, or as collateral security, and without notice of the illegal consideration for which it was given."

To which plaintiff, by his counsel, excepted.

That the charge upon this branch of the case was erroneous in one view of it, and, that too, in the sense in which the Judge intended it to be understood, we cannot doubt. The

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idea of the Judge was, that if Bird's note was illegal in the hands of Wright, because contrary to public policy, then it was void in the hands of an innocent holder, who traded for it before due, and upon a valuable consideration. The Courts have not yet gone to this extent. And here, if the proof shows, as we are inclined to think it does, that Meadow took, not as collateral security, but in payment of a pre-existing debt, the residue or overplus to be turned over to Wright, when collected, we apprehend there would be no difference of opinion, that Meadow would be protected, notwithstanding the taint in the consideration.

But, admitting that it was received and held by Meadow as collateral security only, can he be affected by the alleged vice in the original consideration ?

In *Gibson et al. vs. Conner*, 3 *Ga. Rep.*, 47, this Court held that a note in the hands of a holder, for a valuable consideration, transferred before due, and without notice of any equities between the maker and the payee, as *collateral security for an existing debt*, is not liable to the equities between the maker and the payee. In other words, we put an absolute transfer, and a transfer by way of pledge, upon the same footing, so far as the rights of the holder are concerned.

We are aware that much authority can be found to the contrary of this doctrine, especially in this country. At a more convenient season, we may, if opportunity occur, give a more thorough examination to this question. At present we shall content ourselves to rest upon the decision, as this opinion is spreading out to a most alarming length. We shall content ourselves to dismiss this point with a single remark, seeing that we deem the note valid even in the hands of the *payee*, and it is this: to the extent of the creditor's interest in the collateral security, we can see no good reason why he should not be protected for the same reasons than an absolute holder would be. Why should he be put upon inquiry, as to the consideration of a note not due? And does he not suffer to the extent of his lien, as much as the holder,

for want or failure of consideration on the contract? He might have taken other security, had he been apprised of any defect in the paper. Why is he not an innocent holder in legal contemplation?

Judgment reversed.

BENNING, J. concurring.

The General Assembly have power to pardon convicts of murder or treason. *Art. 2, Sec. 7, Cons. of Ga.*

It would seem to follow, that such convicts have the right to apply to the General Assembly for a pardon. Such a right, if it exists, must of course, include the right to support the application, by a presentation of their case, in its law, and in its facts, to the General Assembly.

But how can convicts exercise this right, except by approaching the General Assembly through individual members of it? There is no mode provided by which they may appear before the General Assembly in its collective capacity. To say, therefore, that they are not to appear before the individual members of it, is to say what might amount, practically, to a denial to them of all right of applying for pardon, with the inclusive right of supporting the application by a presentation of the law and the facts of their case. How else can the pardon-seeking convict open his business, except with individual members of the General Assembly? Who but a member can ever present his application to the General Assembly?

I think therefore, that a convict of murder may lawfully lay his application for pardon before each member of the General Assembly; and may, in support of the application, present each member with the facts and the law of his case.

But if it is lawful for the convict to do this by himself, why is it not lawful for him to do it by attorney? To say that he shall not do it by attorney, is to say that he shall not

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do it at all ; for he cannot do it by himself ; he is confined in a distant jail. I think, therefore, that he may do it by attorney.

If he may do it by attorney, then the services of the attorney by whom he does it, may constitute a legal consideration for a promise on his part to pay money to the attorney, *Lampligh vs. Brathwait*, 1, *Smith's Lead. Cases* 67. *Formby vs. Pryor*, 15 *Ga.*, 258.

But the first of the two charges of the Court below, interpreted by the facts in evidence, said, in effect to the jury, that such services of the attorney could not be a legal consideration for such promise of the convict. That charge was therefore, I think, erroneous.

Grant, however, that the Court was right, and therefore, that such promise was void, still I say, that it could not have been void absolutely ; but could have been void only as between the promisor and the promisee, and the assignees, with notice, of the latter.

“ But, unless it has been *so expressly* declared by the Legislature, illegality of consideration will be no defence in an action at the suit of a *bona fide* holder, without notice of the illegality, unless he obtained the bill after it became due.” *Chitty on Bills*, 116. This position is, I think, well supported by authority.

Meadow was a *bona fide* holder, without notice of the illegality of the consideration, if the consideration was illegal. He obtained the note from Wright, the payee in it, by giving up to Wright a debt which he held on him. He took the note in *payment* of that debt—not as *security* for the payment of the debt.

The note, therefore, in Meadow's hands, must have been valid, at least to an amount equal to the amount of the note given up to Wright. But, according to the second of the two charges of the Court, the note was wholly void.

I think, therefore, that this charge also, was erroneous.

McDONALD J. dissenting.

There are two points in this case, upon which I have the misfortune to disagree with the Court. The first is, whether the illegality of the consideration of the note sued on, can be set up against this plaintiff; and secondly, if it can be set up against him, was it illegal for the payee to contract with the maker of the note, to render him professional services, by attempting to use influence with members of the Georgia Legislature, by reading testimony and explaining and arguing its legal effects to them. The majority of the Court sustain the negative of both of these propositions. I hold the affirmative of both to be the law.

It appears from the evidence that the note was payable to G. J. Wright, or bearer, and that he was indebted to the plaintiff in the sum of two hundred and fifty, or three hundred dollars, and he placed in his hands the note sued on, it being a note on John Bird, for five hundred dollars; and he was to give Wright credit for the amount he owed him, and the balance to pay over to Wright when collected. Wright retained an interest of nearly one half, if not quite, in the note. To that extent it was his own. The other part of the note he transferred to plaintiff who *was* to give him credit when it was collected. He did not give up the claims on G. J. Wright, nor did he credit the claims with any amount on account of the note. To the extent, then, of his demand on Wright, he received the note as collateral security. Nothing more. Under this statement is the plaintiff such a holder of the note, for a valuable consideration, in the usual course of trade, as to preclude the defence sought to be set up? He is the holder of the note; It was transferred to him by the payee, and being payable to bearer, the mere delivery of the note to him for the consideration stated in the evidence was a sufficient transfer of the property in the note to authorize him to sue upon it. But the mere right to sue is not conclusive of the question. A plaintiff to whom a

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note is transferred after due or with notice of defences, has a property in it and he may sue upon it, but that does not preclude the maker's right to put up the same defences against the note when sued by him, that he would have had a right to plead, had the action been in the name of the payee. If the transfer be void, then the transferee has no property in the note, and can not sue, whatever the consideration of the notemay have been, and however unimpeachable it might be in the hands of the original payee, or a holder, *bona fide*, and for a valuable consideration. No case like this has been before this Court, and therefore, the precise case has never been adjudged by it, but I admit that the only difference between this case and *Gibson et al. vs. Conner & Kelly*, 47, is, that, in that case, there was an *implied* trust, to refund to the debtor any balance that might remain after paying the debt, which the note was transferred to secure; while in this case, there was an express agreement to that effect, That case decides, that "a note in the hands of a holder for a valuable consideration, transferred before due, and without notice of any equities between the maker and the payee, as *collateral security for an existing debt*, is not liable to the equities between the maker and the payee." That case is the one before us, with the exception stated. The plaintiff has an interest of between two hundred and fifty and three hundred dollars in the note; the balance belongs to the payee.

In the case of *Gibson et al. vs. Conner*, the learned Judge, who pronounced the judgment of the Court so ably, says that he considers the principle involved there as having been settled by this Court in the case of *Bond against the Central Bank* and the whole Court thought that, whether the plaintiff received the note in payment of, or as collateral security for, a pre-existing debt, he was not liable to the equities between the original parties, unless he received it after maturity or with notice of these equities. I regret that I cannot concur in the judgment rendered in that case, and it is with great diffidence, that I venture to differ from gentlemen of so much

ability as those who presided in that case, supported as they are by the profound legal learning of my brother, who presides with one of them and myself in this case. I must assign my reasons :

I think that when the cases are examined, there will be found a great distinction in principle, the reason of the case, and the authorities between the rights of the maker to defend or to be let into equitable defences against a party who received a note by transfer before due, without notice of equities between the maker and the payee, in *payment and extinguishment* of a pre-existing debt, which the creditor gives up or cancels at the time, and one who holds it as *collateral security* of a debt against the payee, the evidence of which he retains. The question in the case of *Bond against the Central Bank of Georgia* was whether the bank which received the note sued on in *payment* of a pre-existing debt, before due, without notice of equities between any of the parties to it, was a *bona fide* holder, so as to exclude the equities claimed as subsisting between the original parties to the note as a defence. It was a long time a matter of contest in the Courts, whether a note taken in *payment* of a debt due, which was *extinguished*, and the evidence of it, as a promissory note, was surrendered to the party, was a note taken in the usual course of business. It was seriously contended that it was not, but it is well settled now, that when a note is taken in *payment* of a pre-existing debt, or of a debt contracted at the time, and that debt is *extinguished thereby*, so that no action can be supported for the recovery of it, on the failure of the party receiving the note in *payment* to collect it, the note is taken in the usual course of business, and the matters are settled, and at an end, so far as the parties to the transaction are concerned. In the case of *Bond vs. the Central Bank*, this principle was acted on and enforced. The bank retained no claim on Beall, it had settled and surrendered his note, *extinguished* his debt, and it could not have had, on any

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contingency, a right of action against him. The case of *Gibson et al vs. Conner*, is widely different.

Jernigan, Lawrence & Co., transferred the note sued on as collateral security only, to Stewart & Fountain. The latter, notwithstanding the transfer, held on to the note or other evidence of debt, which they held against Jernigan, Lawrence & Co. If they had lost by the insolvency of the maker, or by defences, the entire amount of the note sued on, they would have been in no worse condition than when they received the note. The transfer of the note by Stewart & Fountain to Henry W. Conner, was a collateral security also, and like Stewart & Fountain, he would not have been placed in a worse condition than he was when he received it, if he had been defeated in his suit, for he retained the liability which he took it to secure. In all such cases, the creditor takes the security for what it is worth, and no more. If he fails to collect it, he still holds on to his original debt. He assumes the position of his debtor in relation to the maker of the note. Any other rule would seem to be extremely unjust and oppressive to the maker, who might have a just and sufficient defence against the payment in the hands of the payee. The rule does not embarrass commerce in the slightest degree. The creditor knows, when he receives negotiable securities *as collaterals*, the terms on which he receives them, and he should inform himself by suitable enquiry, of their availableness in his hands, before he incurs expense in efforts to collect them. The case of *Swift vs. Tyson* 16 *Peters*, 1, is a very high authority as a decision on the point before the Court in which it was decided; but that point is not the one presented in the record before us, nor in the case of *Gibson vs. Conner*, and the only part of the judgment of the Court pronounced by Justice Story, and which is insisted on as applicable to this case was a mere *obiter dictum* of the Court, for it was not necessary to the decision of the case.

The bill of exchange had been accepted and the accep-

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tance was indorsed to the plaintiff, before it became due, without notice of anything in the transaction between the parties to the acceptance which would impeach its consideration. It was taken in payment of a promissory note due to him by parties, of whom the payee was one. On the transfer of the acceptance to the plaintiff, he gave up the note in payment of which he received it. For this latter statement, see facts presented by plaintiff's counsel at page four, and the protest of Judge Catron, in which he says he was "unwilling to sanction the introduction into the opinion of the Court, a doctrine, aside from the case made by the record, or argued by counsel, assuming to maintain, that a negotiable note or bill, pledged as collateral security for a previous debt, is taken by the creditor in the due course of trade; and that he stands on the footing of him who purchases in the market for money, or takes the instrument in extinguishment of a previous debt." There is nothing in the record in that case to show that the acceptance was received by the plaintiff *as security* for a pre-existing debt, and yet, Judge Story, in speaking of a negotiable instrument generally, remarks, that the Court "are prepared to say, that receiving it in payment of, or as security for a pre-existing debt, is according to the known and usual course of trade and business." If Judge Story had omitted from his opinion, the expression "or as security for a pre-existing debt," and the arguments used by him to support it, the opinion pronounced by him would have been warranted by the record before him, and in accordance with adjudicated cases, and in authoritative judgment of that Court, and entitled to the highest respect in all judicial tribunals not bound by its decision. But an *obiter dictum* cannot be regarded as authority any where. The cases on this point have been most ably reviewed by Chancellor Walworth in the case of *Stalker vs. McDonald*, 6 *Hills Rep.*, where he sustains fully the right of the maker of a negotiable instrument, transferred to a creditor as collateral security, to go into all defences in a suit by him, that he could have made against

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the payee had he been the plaintiff. If Bird should be compelled to pay the debt sued for in this case, to the present plaintiff, (if his defence would be good against the payee were he the plaintiff,) he will be subjected to great inconvenience, expense and probably to eventual loss to the extent of the note sued on, while, if he were allowed to make the defence, and that defence should be sustained, the plaintiff would be only remitted to the position he occupied before he received the note. He has not given up or extinguished the debt of Wright. I think, therefore, that according to the law, reason and justice of the case, he ought to be allowed to go into his defence, that the plaintiff holds the note under circumstances which admit the defence.

There was no division of opinion in the Court on the point made in the argument and insisted on, as within one of the exceptions to the charge of the Court to the jury brought up in the record before us, to wit: that the charge was not justified by the facts in the proof in this, that the proof did not warrant the Court to say to the jury, that if the consideration of said note was for the services of the payee, in influencing or attempting to influence the members of the Legislature by personal solicitation, or any such means, to vote for the pardon of a condemned criminal, it was absolutely void, and that it made no difference whether the person employed was an attorney or not. The objection was that there was no evidence that the note was to be given on the pardon of a condemned criminal. The testimony is, that the note was given in Milledgeville, and that the payee rendered services for it, with various persons; the service was such professional service as an attorney would render in explaining legal principles to those unacquainted with them; the payee did not influence any person that he knew of, though he used all lawful means to do so with various members of the Georgia Legislature, by reading testimony and explaining and arguing its legal effects to them. Such was the consideration for which the note was given. It was for

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influencing or attempting to influence members of the Legislature; that influence was exerted by reading testimony and explaining and arguing its legal effects to them. It was then, clearly inferable from this evidence that there was some matter or thing before the Legislature on which it had to pass. It was a matter in which evidence of some sort and for some purpose was before the members. It was not usual for the General Assembly to call for evidence to enlighten them in reference to matters connected with their ordinary duties of Legislation. It is sometimes done in special cases. But the law requires that the judges, on the trial of persons for capital offences, and for offences, the punishment of which is confinement in the penitentiary for one or more years, to take or cause to be taken down in writing, a memorandum of the testimony of all witnesses, who testify on the trial, and on conviction of the party arrested, the evidence given on the trial is to be recorded.

A certified copy of this evidence is required by statute to accompany all applications for pardon. By the Constitution, the Legislature has the power to grant pardons for treason and murder, and for no other offences against the criminal laws. The Court had a right to charge upon the issue before the jury with reference to the facts and the law, expressing or intimating no opinion, however, as to what has or has not been proved, or as to the guilt of the accused. Assuming then, that the Court's charge to the jury was justified by the proofs before it, I shall not consider whether it was right in point of law. It is insisted that the influencing or attempting to influence, for a consideration, members of the Legislature to vote for the pardon of a condemned criminal, is not illegal, and that a note given for such service is not void between the original parties, or if the note be transferred, it is not void, on that account, in the hands of a holder, under whatever circumstances he may hold it. I am of opinion that a note given for such a consideration is void. I think it is void because it is against public policy.

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If our laws are wise and necessary to the public safety, they ought to be executed. They are to be presumed to be wise and necessary, as long as they are on the statute book. If they are unwise and unnecessary, they ought to be repealed. If a man violate a public law, as the law against murder, and is prosecuted for it, and is found guilty by the jury, and after exhausting all legal means of escape from the verdict of the jury, or acquiescing in its justice, receives the sentence of the law, and applies to the competent authority for a pardon, the question with those who have the power of pardon should be, whether there is any thing in the circumstances of his case, which should make the law against murder a nullity, as to him. When convicted by a jury, *he is guilty*, and he must remain so, unless judgment be arrested, or a new trial be granted to him. When he receives the sentence of the law, his *rights*, as to defence against the accusation and to exemption from punishment, cease. His guilt is a verity, and his punishment follows. Those with whom the people have entrusted the power of pardon, may remit his punishment and let him go. If they do this, it is not in consequence of any *right* which remains in the convict. It is the work of mercy. It is the pardon of a guilty man. Those whose high constitutional duty it is to exercise this power, will always, no doubt, act with great deliberation, and exercise their soundest judgment, and determine whether the safety of society will admit of the pardon; for a false notion of mercy to the supplicating convict, may be a great outrage upon society. It may encourage wicked men, who meditate the most serious offences against society, to hope that if they should perpetrate the crime, and be detected and convicted, pathetic and influential appeals to the pardoning power might so operate on its sympathies as to secure their ultimate escape from punishment. Public policy, then, which certainly would not forbid a consultation and conversations between a member of the Legislature, and persons who are not members, on the subject, to obtain the benefit of a friend's judgment, requires

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that appeals from mercenary men, who present themselves as disinterested zealots in the cause of mercy and justice, should not be tolerated. The members of the Legislature, who are enquirers after truth, and anxious to discharge their responsible duties to the country, cannot tell, when they are approached by a gentleman on the subject of a pardon, whether he is a disinterested person, or one feed to obtain a pardon. The opinion of the latter is worth nothing, while the views of the former might be entitled to great consideration.

The payee of the note sued on, says that he does not recollect the precise language used by him in his intercourse with the members, but it was such as one gentleman would use to another in discussing the merits of a subject. Unquestionably it was, for he would not have approached a member in any other manner, and the greater the injury to the public interest, for had he said to him, I am employed to obtain a pardon in this case, it will be much to my interests if you will vote for it, and proceed to read and explain the evidence, and argue the case, it would be so open an attempt to cause him to swerve from his duty, as to amount to an insult. The payee of the note says he read and explained the evidence, and argued its legal effects to members. His services were such as an attorney would render in explaining legal principles to those unacquainted with them.

How would an attorney explain legal principles, as an attorney in a cause? In such a manner, of course, as suits the side of the cause he is advocating. He does not argue them before the Legislature, where there are many lawyers, but to members unacquainted with legal principles, outside of the Legislature. He treats the Legislators as triors of the case again, but does not appear before the body, but plies the judges and jurors separately with his explanations and arguments. It is said that the applicant had the right to be represented by attorney. A condemned criminal has no such right. When on his trial, he enjoyed the great constitutional privilege of being heard by himself or his counsel, or both.

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There is great danger to the public safety and interests in allowing cases to be argued from day to day, before the Legislature as though the convict were on his trial. The Legislature has no judicial powers, and it cannot organize itself constitutionally, into an appellate judicial tribunal to hear the case again. It is said, the evidence is taken down, and is required to accompany the application for a pardon, and if the Legislature cannot enquire into the guilt of the party, why send the evidence? The answer is easy. To enable the Legislature to determine for themselves whether there is any thing in the circumstances of the case that, in the judgment of the General Assembly, commends him, though guilty, to their mercy. And again, it sometimes, but very seldom happens, that evidence comes to light after the conviction and sentence and the adjournment of Court, which could not have been discovered or had by any possible diligence on the trial, which, taken in connection with the evidence, very probably (a strong probability) would have produced an acquittal.

It is said that a citizen may take a fee to procure legislation on any subject, and in support of private claims. I concede it with this explanation. If either house of the Legislature agree to hear evidence and argument in support of a private claim, or any proposed measure, before the house or a committee of the house, I have no doubt that public policy is not in the slightest degree infringed, by the employment of counsel to present and explain the claim or other matter before the house or committee. But it is otherwise, if the parties choose to employ counsel to approach individual members with arguments privately. The same arguments, if made publicly, other members might answer and refute. I might point to the circumstances attending the passage of the Yazoo Act, to show how dangerous to the public interests mercenary lobby members are, and how necessary it is to keep the fountain of the law pure, and to allow no hands to dabble therein, except those who carry with them the authority of the people.

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The principle contended for by the defendants in error, was long ago decided in England by Lord Eldon, in the case of *Norman vs. Cole*, 3 *Espinasse* 253. In delivering the opinion Lord Eldon said that "when a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money; the doing an act of that description should proceed from pure motives, not from pecuniary ones." See also, *Hutzfield vs. Gulden*, 7th *Watts*, 152. The case of *Formby vs. Pryor*, 15th *Geo. Rep.*, 258, is no precedent nor authority for the plaintiff in error in this case. That was an application to the Governor for a pardon. The application here was to the General Assembly. In that case, the Governor allowed the party applying, to submit evidence to him. In this case, the General Assembly allowed no such thing; if it did, it does not appear.

In that case, the Governor allowed no evidence of the innocence of the party, but the evidence was consistent with the guilt of the convict, but went to establish facts and circumstances to bring the case within the legitimate purposes of the pardoning power. Here it does not appear that there was any evidence but that given on the trial, and communicated under the statute, with the application for the pardon, and it is clearly inferable, from the evidence, that the effort to influence members to vote for the pardon, was to prove that the convicted person was not guilty; a position that the pardoning power ought not to allow, and a fact that it should not permit to be controverted. There the evidence and argument, if any, was before the pardoning power, the whole power being in the Governor, here it was not to the body having the power of pardon, but to individual constituent members of that body, separate and apart, or at least, not assembled as an organized body, there the evidence was read and expounded. When I say the guilt of the party is a fact that the pardoning power should not allow to be controverted, I do not mean that it is a matter on which they should not exercise their own judgment from the evidence before them, for it might happen

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that in the minds of Legislators, the evidence of guilt to warrant the conviction was so slight as to imply, strongly, that it must have been produced by unjustifiable causes. Organized as our judiciary is, however, such cases can seldom, if ever arise. I mean that the Legislature should not re-try the case. But it is replied, shall an innocent man be punished. *Unquestionably no.* But if he be innocent, the majority of a body, composed of upwards of two hundred enlightened men, will easily discern it, without extraneous aid. But the pardoning power was conferred on a constituent part of the government, mainly for the pardoning of the guilty. In the exercise of the power, functionaries entrusted with it, should never forget that the pardon of the convict, in this particular instance, is equivalent to the repeal of the law against the crime, as to him. There should be strong reasons for it, such as that by the pardon the government would derive information in respect to other offenders, more important to the interest and safety of the country than the punishment of that individual; that, though guilty, and the convict was of sufficient mind and age to be capable of committing a crime, yet he was of a capacity so weak, and an age so tender, that he was made the dupe of stronger minded, depraved men; or, as in cases of riot, resulting in murder or other high crime, when the outrage was planned and gotten up by a part of those only convicted, and others were unwittingly led into it or too weak to resist tumultuous appeals to join, and in all such cases, then it might be considered that the punishment of the principal offenders alone would answer all the objects of punishment. It is unnecessary to attempt to state all the multitudinous cases in which it would be proper to pardon a convicted man. It is sufficient for me to say, in conclusion, that I consider it opposed to the best and wisest public policy, to permit men, for pay, to attempt to impress the mind of the pardoning power, either for or against the exercise of that power, in any case; that it ought to be left free to act on its

own impressions of the public good, uninfluenced by the importunities of interested and paid agents, and that I am, of course, for affirming the judgment of the Court below.

No. 47.—MARK A. COOPER, plaintiff in error, vs. GEORGE YOUNG, Superintendent of the Western & Atlantic Railroad, defendant in error.

Evidence of loss of profits by the necessary suspension of Iron Works in consequence of the failure of a common carrier to deliver coal according to contract, is inadmissible in an action against said carrier for a failure to transport and deliver under his contract.

Case, from Fulton Superior Court. Tried before Judge HAMMOND, at October Term, 1856.

This was an action brought by Mark A. Cooper, against George Young, as superintendent of the Western and Atlantic railroad, to recover damages alleged to have been sustained by reason of the failure of defendant to transport by railroad and deliver a certain quantity of stone coal at the times and places, and in the quantities, which defendant undertook to do.

The plaintiff in his declaration averred that, in the summer of 1852, defendant undertook and promised to transport from Chattanooga, Tennessee, and to deliver to him at Etowah, Cass county, Georgia, for the use of his iron mills, one car load of stone coal per day. That during the month of December of that year, he failed to deliver said coal as per contract, whereby plaintiff's rolling mills ceased operations for the most part of said month, and that he sustained damage thereby to the amount of three thousand dollars.

The defendant pleaded: 1st. The general issue. 2d. That

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if such contract as that alleged was ever made, it was by some one having no authority so to do, and without consideration, the said plaintiff having paid or tendered no part of the freight. 3d. That if any coal was ever received by said railroad, the same was duly transported and delivered at the place of destination, within a reasonable time after it was received; and if it was not, it was because said railroad and its officers had not the means of transporting the same.

Plaintiff, upon trial, offered the depositions of two witnesses, who were employed and engaged in and about his iron manufactory, in December, 1852, who testified that the operations of the establishment were suspended for sometime during that month, in consequence of the failure of the railroad to deliver coal; that the heating furnaces of the rolling mill was stopped for five days, and the puddling furnaces, the whole of the month; that the loss sustained by the stoppage of the rolling furnaces was about seventy dollars per day, and of the heating furnaces about one hundred and sixty dollars per day. This estimate of loss was based upon a calculation of the number of tons of iron each furnace would produce daily, if in operation, the value of said iron, and the net profits on each ton manufactured.

The Court, upon motion of defendant's counsel, ruled out and rejected all that part of the depositions relating to the loss of profits sustained by plaintiff in consequence of the stoppage of his mills, and the estimate based upon profits plaintiff would have made if his mills had been in full operation.

To which ruling and decision, counsel for plaintiff excepted, and thereupon tendered his bill of exceptions, &c.

THOS. L. COOPER, for plaintiff in error.

OVERBY & BLECKLEY, for defendant in error.

By the Court.—McDONALD, J. delivering opinion.

This suit is instituted against the defendant, as a common carrier, for the non-delivery of stone coal, which he had undertaken to carry for the plaintiff from Chattanooga, in Tennessee, to Etowah, in Cass county Georgia. The plaintiff is engaged extensively in the manufacture of iron, and relies for his supply of coal, to carry on his operations, on that which is carried by railroad from Chattanooga to the neighborhood of his works. The coal belonged to plaintiff, the defendant was to transport it. It is alleged, that by reason of the failure of defendant to carry the coal according to contract, the plaintiff was obliged to suspend his work, and that, by reason of that suspension, he failed to make a certain amount of per diem profit, and this loss of profit, he insists, is the measure of his damages. He offered proof of these profits, which was objected to by the defendant's counsel, and the decision of the Court sustaining the objection, is the only error complained of in the record. The soundness of the decision in law, depends on the rule by which damages are to be assessed against common carriers, for non-delivery of articles committed to them, at the time and place stipulated for their delivery.

The general rule is, that if a common carrier fail to deliver goods according to contract, he is liable for the value of the goods at the time and place at which he engaged to deliver them. The rule is an easy and simple one. It is just to the owner, and does no injustice to the carrier. *Sedgw. on the Meas. of Dam.* 355 *Angl. on Car.* 460, *Edward on Bailment*, 570. In such cases the carrier deducts from the value at the place of destination, the freight for transporting them and pays the balance. The owner gets his profit, and the carrier gets his freight. But if there be no trade in the article transported at the place of destination, and nothing of the kind can be purchased there; and the owner wishes it for consumption in carrying on his business, and cannot proceed without it, what is the rule? We know of no rule ma-

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king the carrier liable for the loss of profits in the sale of articles to be manufactured of materials delivered to him for transportation, if he should fail to deliver them.

When he undertakes as a common carrier, he undertakes in view of the liability which the law annexes to the character of common carriers, for a breach of their contracts; and the owner, when he commits his goods to him, does it likewise with a view to the redress which the law entitles him to against the carrier, if he make default. But because there is no trade in the article delivered to be carried at the place of destination, it is no reason that the carrier should not be liable for the breach of his contract. The plaintiff is injured, and seriously injured by his default. In the case before us the plaintiff is engaged at heavy expense, in the manufacture of iron; and coal is essential to the carrying on of his business. His works are constructed for the use of coal, and a failure in a regular supply, subjects him to serious losses. If there be no market at the place at which the coal was to be delivered to the plaintiff, from which he might supply himself, he must resort to some other mode of transportation however expensive, or stop his works. In the case of *O'Conner, vs. Foster, 10th Watt. 418 cited in Sedgwick on Dam. 357*, the defendant was sued for damages for refusing to transport wheat from Pittsburgh to Philadelphia, according to contract. The transportation was prevented by the approaching freezing of the canal. The defendant contended that the measure of damages was the price agreed on for the freight, and that for which the carriage by others might have been obtained; and the Court held that this would be the rule, if the plaintiff could have obtained another conveyance. There being a market for wheat at Pittsburg, as well as Philadelphia, the Court held, the rule of damages to be the difference between the value of wheat at Pittsburgh, with the freight added, and its value at Philadelphia.

In estimating the damages in cases when the article to be transported cannot be purchased at the place of destination,

and the carrier who has contracted to carry it has the exclusive right of transportation by the cheapest mode, the difference between the price agreed upon or usual by that mode and the terms on which others would carry it by other modes of transportation, ought to be considered, and in this case and all like it, it might not be improper to admit additionally, evidence of losses by the expense of hands, &c., during a *necessary* suspension of business occasioned by the default of the carrier, for a period during which the plaintiff, by ordinary diligence, could not supply himself by other means with the article agreed to be carried.

It is proper for me to remark that the rule as to the measure of damages in this case was not very fully discussed by us, as it was not necessary for the decision of the question presented in the record, to go beyond the particular measure of damages, insisted on by the plaintiff.

We know of no rule which subjects a common carrier to a higher measure of damages, for a breach of his contract, than the amount of profits which the owner might have made, over the freight and cost, by a sale at the time and place at which the article or goods to be transported were to be delivered, provided there be a market for the article there. In case there be no market for the commodity or goods, and the owner requires them for his own use, I do not see why the rule should not be modified to suit the justice of the case, but it cannot, in our judgment, be so modified as to hold that the carrier shall be liable for the profits which the owner might have realized by the sale of articles into which he might manufacture them. Such a rule would make the carrier an insurer against all casualties in the process of manufacturing.

Several cases have been relied on to establish the proposition contended for, but none of them, in our judgment, sustains it. The case of *Mastalom against the Mayor of Brooklin*, 7 *Hill's New York Reports*, *Sedgwick on Dam.*, 74, was not the case of a carrier, but it was the ordinary case of an agreement to purchase at stipulated prices, marble to be

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delivered as agreed upon in the contract. The seller of the marble had to purchase it. The agreement had all the essential parts of a contract. One party had no right to disaffirm and annul it without the consent of the other.

If the plaintiff in that action had been a defendant, and the suit had been for a failure to deliver the marble agreeably to his contract of sale, he could not have discharged himself from liability, by alleging that he could not himself purchase the marble at any price, but he would have been held to the contract, and the damages to which he would have been subjected, would have been the difference between the price at which he had contracted to sell it, and the price that the plaintiff had, or would have had to pay for it, however enormous, if it was a price, and no greater, at which the same quality of marble could be obtained, by the use of due prudence and diligence. If one of the elements of a contract be mutuality of obligation, the other party was certainly liable for a breach, from whatever cause, except the fault of the plaintiff, and he could not excuse himself by his abandoning or suspending the work on which he intended to use the marble.

But the action in this case was not instituted for a breach of the sale of coal at a stipulated price to be delivered at that place. Had it been, the measure of damages would have been the difference between the market price at that place and the stipulated price, without reference to its value elsewhere.

The rule which I have suggested as the proper one for the measure of damages against a carrier who has the exclusive right of transportation by the cheapest mode, at the suit of a person engaged extensively in manufacturing, and who, from the breach of the contract for carrying the article necessary to him in his business, by the carrier, has been compelled to suspend his operations, seems to meet the justice of the case more nearly than any that occurs to my mind.

Judgment affirmed.

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No. 48.—JOHN W. POWELL, Ex'r. plaintiff in error, vs. J. D. BROWN, defendant in error.

- [1.] A denial of the insolvency of a firm on whose insolvency the equity of a cause, in some measure, depends, when made on knowledge, information and belief, with a positive averment of its solvency, is not sufficient to authorize the dissolution of an injunction granted by the Chancellor.
- [2.] An executor who answers mainly on knowledge, information and belief, and whose representative character, generally, shows that he can have no positive knowledge, cannot displace the equity of a bill so as to entitle him to a dissolution of the injunction, without proof to sustain his belief.

In Equity, from Coweta Superior Court. Decision, on motion to dissolve injunction, by Judge HAMMOND, at chambers, 2d January, 1857.

This was a bill filed by Jeremiah D. Brown, against John W. Powell, executor of William B. Brown, deceased, for injunction, discovery, and relief.

The allegations are, that prior to the year 1854, William B. Brown was engaged in merchandising in the town of Newnan. That on the 28th day of February, 1854, a partnership was formed between said William B. Brown, Samuel R. Bevis, and complainant, under the name and firm of *Brown, Bevis & Brown*; that the stock of goods on hand and owned individually by Wm. B. Brown, was taken by the new firm at seven thousand five hundred dollars; that Bevis and Jeremiah D. Brown were to pay to W. B. B. each, the sum of two thousand five hundred dollars for two-thirds the value of said goods, thus bought from him; that about the 13th January, 1855, Bevis retired from the business, and complainant and his brother, Wm. B. Brown, bought him out and continued business under the firm of J. D. & W. B. Brown. Bevis had paid W. B. Brown the sum of eight hundred dollars in part, on his indebtedness for the stock bought from him. And the terms upon which Bevis sold out were, that he would relinquish and convey all his interest in said firm, upon being repaid the eight hundred dollars with interest, which he had paid to Wm. B. Brown, and allow him his store account and about four hundred dollars for his services rendered during the time he was in

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the store. In effecting this arrangement complainant and defendant's testator gave to Bevis their note jointly for about twelve hundred and thirty-four dollars, eight hundred of which was for the amount he had, as above stated, paid for stock, and complainant and his brother, the defendant's testator, became equal and joint partners. That there never was any settlement or adjustment of said note, and complainant has been sued thereon since his brother's death.

The bill further charges that the firm of Brown, Bevis & Brown, was indebted to complainant at the time of its dissolution, about the sum of four hundred and sixty-eight dollars and seventy cents; and that the new firm of Brown & Brown was indebted at the time of the death of W. B. Brown, to complainant the sum of two thousand three hundred and seventy-two dollars; and that Wm. B. Brown at the time of his death was individually indebted to said firm of Brown & Brown the sum of two thousand two hundred and seventy-one dollars and thirty-two cents, and that he was indebted to complainant individually about one thousand six hundred and ninety-eight dollars. That there is still outstanding debts against the firm of *Brown & Brown*, amounting to about seven thousand two hundred and thirty-six dollars and eighty-six cents. That said firm is insolvent. That the said William B. Brown died the 30th of July, 1855, and the duty of settling and winding up the business of said firm has devolved upon complainant. That John W. Powell, the defendant, is the executor of the last will of said William B., and soon after his qualification, filed his bill in equity, to marshal the estate of his testator, and in which he avers that the estate of his testator is *insolvent*, and which complainant also charges to be the fact. Powell the executor, has commenced his action *at law* against complainant, and has on the first trial recovered a judgment for the sum of three thousand eight hundred and forty-two dollars and eighty-six cents, from which, complainant has appealed. That said claim is made up of three items; one of two thousand five hundred dollars, complainant's share of the stock of goods sold by tes-

tator to the firm of *Brown Bevis & Brown*; one thousand two hundred and fifty dollars, being the one half of Bevis' share, and which was received and bought by the new firm of *Brown & Brown*, and some two hundred and twenty dollars for board, &c. Complainant charges that there was a great error and mistake made in the inventory of the goods on hand at the time he and Bevis went in with his brother, and that instead of seven thousand five hundred dollars, there was not more than four thousand five hundred dollars worth on hand at the time; and that his services for winding up the affairs of the firm of *Brown & Brown*, since his brother's death, are worth one thousand dollars. He offers to come to a full and fair settlement, &c., and prays that the action at law be enjoined; that the accounts be taken, and the rights and interests of the respective parties and creditors be declared and settled by a decree of this Court, &c.

The answer admits that Bevis sold out to complainant and his brother, as charged in the bill, and that the note for one thousand two hundred and thirty-four dollars, given by them jointly to Bevis, is outstanding, unpaid, and that complainant has been sued thereon: denies, or does not admit the indebtedness of his testator to complainant, or to the firm of *Brown & Brown*, as charged in the bill: denies that there was any error in the inventory of the goods sold by his testator to the firm of *Brown, Bevis & Brown*, but that the same was true and correct, and that the said sum of two thousand five hundred dollars, part of defendant's claim, and the said sum of one thousand two hundred and fifty dollars, another part of defendant's claim against said complainant, based on the said inventory, are just and ought to be paid. Admits that complainant's services would be worth one thousand dollars, if he had diligently and properly wound up and settled the business and affairs of said firm, but denies that this has been done; and denies that the firm of *Brown & Brown* is insolvent, but claims that there will or should be a large balance, after paying and discharging all the debts and liabilities of said firm.

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Upon the coming in of the answer, defendant, at chambers, moved to dissolve the injunction, on the grounds :

1st. That there was no equity in the bill.

2d. That if there was any equity in the bill, it was fully sworn off in the answer.

After argument, the Judge refused the motion, and upheld the injunction, and defendant excepts and assigns error.

J. W. POWELL, in *propria persona*, for plaintiff in error.

C. J. MCKINLEY, for defendant in error.

By the Court.—MCDONALD J. delivering the opinion.

[1.] In deciding the motion to dissolve the injunction, the presiding Judge in the Court below held, that inasmuch as the complainant, who, is the surviving partner of the firm of J. B. & Wm. B. Brown, and has the assets of the said firm in his hands, charges positively that the said firm is insolvent, he would not undertake to decide the question of insolvency, although the answer denies it positively, but he would refer that question to the jury. This decision, and this *alone*, is excepted to as illegal and erroneous. There is no error assigned on the refusal of the motion to dissolve the injunction. But the decision of the Court, as excepted to, must be sustained. The answer to the charge of the insolvency of the firm is that, the "defendant, answering from *his knowledge information and belief*, denies that the firm of J. D. & W. B. Brown is, or was insolvent," and goes on to deny that the solvent notes, assets and merchandize amounted only to the sum set forth in (Exhibit C.) and then proceeds to "say distinctly that said firm was entirely solvent at the death of the said Wm. B., &c. Here is a denial of insolvency made expressly upon knowledge, information and belief, and then an averment of solvency distinctly made, but must be considered as distinctly made, under the same qualifications that the denial is made, to-wit: on the knowledge, information and belief of the defendant. The defendant cannot know more positively that the firm was solvent than he does,

that it was insolvent. Hence this reason assigned by the Court is one of the many good reasons apparent in the bill and answer, for refusing the motion to dissolve.

The argument of the cause before this Court, traveled out of the solitary assignment of error presented in the record, and covered all the ground of a sweeping exception to the decision of the Court, refusing to dissolve the injunction. We will not follow the counsel through all the points presented in the argument. It might be improper, as this case must be submitted to a jury, and it is not necessary to the decision of the law of the case on many points, to deal with that part of the case which would lead to a discussion of the facts.

We will remark that the Equity of this case does not depend so much on the solvency of the firm of J. D. & W. B. Brown, as it does on the insolvency of the estate of Wm. B. Brown. The suit at law enjoined is for the recovery of three distinct items, to-wit: two thousand five hundred dollars for one-third of the stock of goods on hand, all of which belonged to the testator, at the time the partnership was formed; one thousand two hundred and fifty dollars, one half of the interest of Bevis when he sold to the Browns his interest; and two hundred and twenty dollars for eleven months board. When the Browns purchased the interest of Bevis, they agreed to refund to him eight hundred dollars with interest, a sum which he had paid William B. Brown on the purchase of one-third of the stock of goods, and four hundred dollars for his services in the firm, while he was a partner. The two Browns gave their joint or joint and several note for one thousand two hundred and thirty-four dollars, the thirty-four dollars being for interest as I suppose. On this note the complainant has been sued since William B. Brown's death. The executor of his estate has not been sued. The entire amount of this note will be recovered from the complainant, if he should not pay it. As the executor claims and has sued the complainant for one thousand two hundred and fifty dollars, as his share of the unpaid purchase money of Bevis, for which he became liable on Bevis' sale of his in

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terest in the partnership, the eight hundred dollars, which had been paid by Bevis, and which was to be repaid to him, became the debt of William B. Brown, and one half of the interest and one half of amount paid for services of Bevis, became also the debt of William B. Brown, and if his estate is insolvent, and the complainant should be forced to pay the whole amount, he certainly has a right, upon the allegation of the insolvency of his estate, to ask a Court of Chancery to decree to him, out of the firm assets going to the testator, enough to pay that demand, on its being paid by him. He cannot set it off at law, because he has not paid it. If he allows it to pass into the hands of the executor, it will become assets in his hands payable to creditors of higher degree, if any, and if none, to complainant and creditors of equal degree, rateably.

[2.] So in respect to other matters in complainant's bill set forth as claims connected with, or growing out of the partnership business, most of which are denied or explained on the information and belief of the executor. Such denials do not displace the Equity of complainant's bill. The Court will require a positive denial or proof to support the denial on information and belief, before it will dissolve the injunction.

I might refer to the alleged mistake in the inventory by which the first purchase of the stock of goods was made, and other things, of which a sufficient denial is not made. It is true, that such allegations must be supported by complainant's proof at the hearing; but the injunction ought to be retained until a full investigation can be had on evidence.

The denial of facts, constituting a strong Equity on the part of a complainant, by an executor who answers on information and belief only, and whose representative character, in most cases, shows that he can have no knowledge, is not sufficient to entitle him to a dissolution of an injunction granted by the chancellor on these facts positively charged. It is our judgment that there is enough in this case to have justified the Court in retaining the injunction.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MILLEDGEVILLE,
MAY TERM, 1857.

CHARLES J. McDONALD, } Judges.
HENRY L. BENNING, }

No. 1 — JOHN HAMMOND, escheator, plaintiff in error, vs. EZEKIEL S. CANDLER, claimant, defendant in error.

Judgment can be arrested for matter only apparent on the face of the records which would render the judgment erroneous.

Forfeiture of slaves, from Baldwin Superior Court. Tried before Judge HARDEMAN, February Term, 1857.

This was a proceeding by John Hammond, escheator, of Baldwin county, to forfeit eleven negro slaves, under the provisions of the statutes of this State.

The declaration of forfeiture alleges, that three of said slaves were purchased by Joe Butler, alias Joe Hall, a free person of color, since the passage of the Act of 19th December, 1818; and since the purchase thereof, one of said negroes, a *woman*, has had eight children; that said Joe has recently died, and all said slaves were held contrary to law, and are forfeited to the State.

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Ezekiel S. Candler interposed his claim to said slaves, and upon the appeal at February Term, 1857, the special jury empanelled and sworn to try the cause, returned a verdict for the escheator. On the same day, the jury were discharged for the Term, and on the day thereafter, Saturday, being the last day of the Term, claimant made a motion to arrest the judgment, on the ground that the jury who rendered the verdict, were not sworn as prescribed by Act of 19th December, 1817, in cases of escheats.

The Court granted the motion and ordered judgment in said cause to be arrested.

Thereupon counsel for escheator excepted.

1st. Because the Court erred in granting said motion to arrest the judgment, on the ground therein taken.

2d. Because even if the jury should not have been sworn as prescribed by the Act of 1817, in cases of escheats, yet the Court erred in simply arresting the judgment, instead of setting aside the verdict and ordering a new trial.

W. MCKINLEY, for plaintiff in error.

HARRIS, ROCKWELL and KENAN, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The record in this case, presents no intrinsic defect, which would of itself, render the judgment of the Court erroneous or reversible. It does not appear, but that the oath administered to the jury, was the oath prescribed by law. They were sworn, and the presumption of law is, that they were sworn legally. *Tidd's Prac.* 918; 1. *Sellon's-Pr.* 498. The judgment cannot be arrested for intrinsic and foreign matter, not appearing on the face of the record. The Court below erred, therefore, in arresting the judgment for a cause not patent on the record, and his judgment must be reversed.

Judgment reversed.

No. 2.—DANIEL ROBERTS, plaintiff in error, vs. THOMAS M. FOREMAN, et al. defendants in error.

- [1.] In an action of ejectment by heirs at law, proof that the plaintiffs are children "of the late J. B.", with the admission by the defendant that one of the children was the owner, in the absence of counter-vailing proof, is sufficient to authorize the jury to find the title in the plaintiffs.
- [2.] If upon an examination of the whole evidence, the inconsistencies of witnesses, and the suspicious nature of title papers, the verdict of the jury is such as the whole case warrants, it will not be set aside.

Statutory action to recover land, &c., from Laurens Superior Court. Tried before Judge LOVE, at October Term, 1856.

Thomas M. Foreman, Joseph Bryan, James P. Screven, and Jonathan R. Bryan, brought suit against Daniel Roberts, to recover lot of Land No. 176, in the 18th district of originally Wilkinson now Laurens county.

The plaintiffs upon the trial, offered in evidence a plat and grant from the State of Georgia, to Joseph Bryan, of Chatham county.

Next, the answers of *George M. Troup*, to interrogatories, who swore in substance; That he knew the parties; that Thomas Foreman, Joseph Bryan and Jonathan R. Bryan, are the sons of the late Joseph Bryan, of Chatham county, and James P. Screven married a daughter; that for several years prior to the last two or three, the defendant at different times and places, made inquiries after Mr. Foreman, saying that he wished to see him; that he owned a tract of land drawn by his father which he wished very much to buy, it lying adjoining him, and that he would give as much or more for it than any one else, and that he thought he was entitled to a preference as he had been keeping off trespassers; and that he looked to no body but Foreman as owner, and as capable of making a title; that defendant's conversations were the same in substance on every occasion, when

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the subject was spoken of, the last being, as well as witness recollects, within the last three years. In the month of September, 1854, defendant came to his house, and first introduced the subject of this suit, and seemingly with a desire to know if he, witness, could not make some alteration in his answers to former answers to interrogatories, and especially with regard to the time of the conversation. Witness told him he would not alter a word. Defendant then said he never designed to cheat or defraud Foreman. Witness told him, he was glad to hear it; he then said that witness had stated in his answers what was strictly true; that he never denied it, and that he would make confession of it in open Court. Said that my (witness') son as agent of Mr. Foreman, had sold him the land, which he was ready to pay for, but that Foreman refused to make him a warrantee title; mentioned to him his repeated promises to give as much, or more, for the land than any body else, which he admitted, only expressing a doubt, that he had used the word *more*.

The answer to the cross interrogatories are the same as to the direct.

Interrogatories executed 2d November, 1854.

Possession was admitted by defendant, and plaintiffs closed.

Defendant then opened his case and read the answers of the same witness—*George M. Troup*, to interrogatories executed 17th August, 1853.

The answers to the first and second interrogatories are the same as those before given; and to the third, he answered, That for several years prior to the last *two or three*, at different places, that defendant made inquiries after Foreman, saying that he wished to see him; that he owned a tract of land drawn by his father, which he wished to buy, it lying adjoining him, and that he would give as much or more than any one else, and he thought he was entitled to the preference as he had kept off trespassers, and that he looked

to nobody but Foreman as owner, and capable of making title, and his conversation, was the same in substance on every such occasion, the last as well as I recollect being within three years, &c.

To the cross interrogatories witness answers in substance: That the conversations with defendant were repeated within the last seven years; that in all of them no right or title was recognized or insinuated in any body but Mr. Foreman, and nothing said about compromises, on the contrary, defendant said he would give as much or more than any one else; knows nothing of the purchase or possession of defendant; never knew he was in possession of the land, unless his assumed agency for keeping off trespassers can be so construed; it is a long time since the first conversation; thinks the last was within three years.

Defendant then introduced two quit claim deeds, one from Daniel McDaniel to Joseph Aycock, dated 11th August, 1835, for the consideration of one hundred dollars, and recorded 27th July, 1836. The other from Aycock to defendant, dated 27th March, 1851, for the consideration of \$150.

Plaintiff in reply, proved by one *Mullis*, that the land was worth seven or eight hundred dollars, and was in Laurens county.

Joseph Aycock was then sworn by defendant, says: That he went into possession of the land in 1835, and held possession and had a portion in cultivation from the time he bought from McDaniel up to the time he sold to defendant, in 1851; McDaniel settled it about 1830; that witness had rented it out when he did not cultivate it himself, and had paid taxes for it every year while he owned it, and during all that time, he claimed it as his own, and was never molested nor did any one ever tell him that the land was not his, or that there was any other title or claimant, during the time he held it; that he rented it to defendant several years; did not recollect that McDaniel when he sold to him, said anything to him about not owning the land; he did

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claim the land and sold it to witness for fifty dollars; he did not tell Roberts when he sold to him that he only had a quit claim, and did not own it, as he recollected; but does not recollect all that was said by him and Roberts about it; he rented out the land for four or five years, up to 1838, then moved to Sumter, and while there he rented it to Roberts; a portion of it one William Hampton had fenced in and cultivated; that from the time he purchased, he claimed and exercised control over it, and used it as his own. McDaniel lived on the land a year or two, after he purchased it, and all the time he had the land, or a portion of it under fence, and rented and cultivated and claimed it as his own. Roberts did tell him that some man had stayed all night at his house and said that he owned the lot and desired Roberts to keep off intruders; don't recollect who he rented it to while in Sumter; don't remember whether it was cultivated or not, during the time, but he never relinquished his possession or control, nor did he abandon it. Roberts gave him seventy-five dollars for it; don't recollect who he rented it to in 1840, or 1843 or 1844; nor how much Roberts paid him for the rent, nor what years, nor how many years Roberts rented it. There were six or eight acres under fence at the time he owned it.

The foregoing is the substance of Aycock's testimony, brought out by the examination in chief, cross examination and re-examination, both by defendant and plaintiffs.

The jury found for the plaintiffs, and defendant made a motion for a new trial, on the ground that the verdict was contrary to law, against evidence and contrary to the charge of the Court; and after argument, the Court overruled the motion, and refused a new trial, and defendant excepted.

H. MORGAN, for plaintiff in error.

WARREN, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

All the errors assigned in the record are abandoned except that predicated on the refusal of the Court to grant a new trial, on the ground that the verdict of the jury was contrary to evidence.

[1.] It is first insisted that the plaintiffs' evidence was insufficient to sustain their title to the premises sued for, and on that account a new trial ought to be granted. The grant of the State of Georgia to Joseph Bryan, established the title in him. Governor Troup testified that the plaintiffs, with the exception of James P. Screven, are the sons of Joseph Bryan, and that James P. Screven married his daughter. He refers to Joseph Bryan as the *late* Joseph Bryan. The plaintiff in error wished to see Mr. Foreman, and said, that he owned a tract of land drawn by his father. This was evidence enough for the consideration of the jury, and to authorize them to find the title in the plaintiffs, in the absence of countervailing proof. There was no evidence that the title ever passed from the grantee to any one else. The only evidence submitted by the plaintiff in error to the jury, was the deed (quit claim) from Daniel McDaniel to Joseph Aycock, and a deed of the same description from Aycock to himself; neither of them proceeded from the grantee. The evidence of title in the defendants in error, though slight, was sufficient to warrant the jury to find in their favor on that point of the issue, no testimony whatever, having been given by the opposite party to impair its force.

[2.] But it is insisted, in the second place, if the title was in the plaintiffs, they had lost it, by the statute of limitations. To sustain the plea of the statute, the plaintiff in error attempted to connect his possession with the two quit claim deeds, as color of title.

In that part of Georgia where lands were distributed by lottery, and each tract is known and designated by distinctive

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marks and numbers, and there can be but one person to whom a grant from the State could issue, quit claim deeds, not connected with the claim of title, should be looked upon generally, with great suspicion, as having no rightful foundation, and as having an origin in trespass or fraud. They are certainly not entitled to great favor. It is true, there may be instances in which they were *bona fide* made on one side, and *bona fide* received on the other. Possession resting on a quit claim deed of this description, may unquestionably ripen into a title, and defeat the negligent owner of a better title. On the trial of this case the jury certainly had the right to investigate all the circumstances, and determine from the evidence before them, whether the plaintiff in error did not so recognize title in the defendants in error, as to authorize them to find that he held in subordination thereto. *Wood et al. vs. McGuire's Children*, 17. *Geo. Rep.* 320. The suit was brought on the 13th day of August, 1852. The deed from Aycock to Roberts bears date 29th March, 1851. Governor Troup, on the 17th August, 1853, testified, that for several successive years, prior to the last two or three years, within which time he had not seen him, Mr. Roberts, whenever he met him, made anxious inquiries after Mr. Foreman, and said that he (Foreman,) owned a tract of land drawn by his father, which he wished very much to buy, thought he was entitled to the preference that he had been keeping off trespassers and intruders, that he looked to nobody but Mr. Foreman as the owner, and as capable of making a title. The conversation was in substance the same at each time, and the last, as well as witness remembers, was within three years of the time he deposed. The acknowledgment by Roberts, of title in Foreman, repels the presumption of his holding adversely. *Conyers vs. Kenan & Hand*, 4. *Geo. Rep.* 313.

McDaniel, according to the testimony, was a trespasser. Aycock who purchased from him was content to take a quit claim deed, and did not attempt to trace his title, and no title

in him is exhibited. The subsequent possession of Aycock and his tenants is not proven to be continuous. It cannot be tacked to McDaniel's, for McDaniel had no color of title to support his possession. If there was an adverse possession, it could not date anterior to McDaniel's deed to Aycock. Aycock testifies that he went into possession of the lot in 1835, and held possession of it, and had a portion of it in cultivation from the time he bought it of McDaniel, up to the time he sold it to Mr. Roberts in 1851. That he had rented it out when he did not cultivate it himself, and paid taxes for it every year while he owned it; that there were six or eight acres under fence, all the time he owned it.

On his cross examination, he testified that he rented out the land and cultivated it himself for four or five years, up to 1838. He then moved to Sumter county, and while there, he rented it to Mr. Roberts. From August, 1835, the date of Aycock's deed, to 1838, was two years and five months, far short of four or five years. Although he had stated that while in Sumter county he rented the land to Roberts, he afterwards says, he does not recollect to whom he rented it while he was in Sumter county, and does not recollect whether it was cultivated or not, during the time. He does not recollect what rent Mr. Roberts paid him, nor how many years Roberts rented it. It is unnecessary to consider what weight the jury ought to have given to the deeds as color of title. Conceding to them all the force and effect that any quit claim deed is entitled to for that purpose, we are not prepared to say that the verdict of the jury was contrary to evidence.

The jury had a right to weigh the testimony, compare and sift it, and apply it to the issues before them. They did so, and we are not sure that we should not have come to the same conclusion, if the facts, manner of the witnesses in testifying, and the apparent inconsistency of the statements of some of them, had been submitted to our decision.

Judgment affirmed.

Willis vs. Willis, adm'r.

No. 3.—THOMAS WILLIS, plaintiff in error, vs. ROBERT V WILLIS, adm'r, defendant in error.

In trover for negroes, the verdict was for the plaintiff for \$2,700, "which," could "be satisfied by delivering to the plaintiff, the said slaves, within ten days." Within the ten days, one of the slaves died and another was attacked with a disease of which it shortly afterwards died.

Held, that the defendant was, nevertheless bound to pay the \$2,700.

Illegality, from Baldwin Superior Court. Decided by Judge HARDEMAN, at February Term, 1857.

Robert V. Willis, administrator of Keziah Willis, deceased, brought trover against Thomas Willis, for the recovery of five negroes and other property, alleged to belong to his intestate.

At August Term, 1854, the jury returned the following verdict, "We the jury find for the plaintiff in this action, twenty-seven hundred dollars, which can be satisfied by delivering to the plaintiff, the said slaves within ten days, also, the further sum of five hundred dollars for hire of slaves, also, the cost of suit." Judgment was entered up on this verdict the 5th day of September, 1854. At the same term of the Court, a motion for a new trial was made and overruled, to which decision defendant excepted and carried the case up to the Supreme Court, May Term, 1855, when the judgment of the Court below was affirmed. At August Term, 1855, of Baldwin Superior Court, the said judgment of the Supreme Court was entered on the minutes and made the judgment of that Court, and execution on the original judgment was issued 8th September, 1855, and on the last day of the Term of said Court, defendant carried to plaintiff's house and left in the yard all the negroes recovered, except two, *Amos and Rosetta*, who had in the mean time died. The proof was, that Amos was taken sick on the 14th of September, 1854, and died on the 25th; that when visited by the physician for the first time on the 15th, he was too sick to be removed, and the physician judged he had been too sick the day pre-

vious. Rosetta died within the time, between the 5th and 15th of September, 1854.

When the negroes were brought by defendant to be delivered up, plaintiff said he should not receive them or consider them delivered, until he saw his attorney, who had before advised him not to receive them, and there was no proof that plaintiff afterwards had anything to do with the negroes, except to have them levied on and sold under his execution. On the 4th of October, 1855, the deputy Sheriff levied upon said slaves (four in number, there having been an increase of one since the commencement of the suit,) by virtue of said *fi. fa.*, and sold the same on the first Tuesday in December, 1855, for the sum of \$1,326, which was applied to said *fi. fa.*

Afterwards, there being still a large balance due on said execution, the Sheriff levied upon a lot of land (202½ acres) and two negroes belonging to defendant, and he interposed by affidavit of illegality, upon the grounds :

1st. Because the judgment on which the *fi. fa.* issued was rendered in an action of trover, and was conditional, and that upon the termination of the action, defendant delivered to plaintiff all the negroes recovered, except Amos and Rosetta, who had died pending the litigation and during the pendency of the writ of error in the Supreme Court, and by the act of Providence he was prevented from delivering them.

2d. Because the amount of the valuation of said negroes, which had died, was not deducted from or credited on said *fi. fa.*, nor is the value of those that were delivered up credited on the same.

After hearing the affidavit of illegality and argument thereon, the Court dismissed the same—no election to deliver the negroes having been made within the ten days allowed by the jury.

To which decision, defendant, by his counsel, excepts and assigns the same as error.

 Willis vs. Willis, adm'r.

A. H. KENAN, for plaintiff in error.

McKINLEY, for defendant in error.

By the Court.—BENNING J. delivering the opinion.

What did the judgment give the plaintiff the right to have from the defendant? This:

1st. The cost of the suit; 2d. \$500, *absolutely*; 3d. \$2,700 or the slaves sued for, and them delivered to him in ten days. The words of the verdict, with respect to the \$2,700, are, "We the jury find for the plaintiff in the action, twenty-seven hundred dollars, which can be satisfied by delivering to the plaintiff, the said slaves within ten days." Twenty-seven hundred dollars, in money or in negroes, then, the plaintiff became entitled to have from the defendant by the verdict. And, on the other hand, twenty-seven hundred dollars, in money or in negroes, the defendant became liable by the verdict, to pay to the plaintiff.

Now, it must be manifest that such a liability can be discharged by nothing short of a *payment*—a payment in the one thing or the other, in the money or in the negroes.

It follows, that if for any cause, the defendant, though electing to make the payment in negroes, was prevented from doing so, he was not in the least discharged from his liability to make the payment in money.

This is the result, if we confine our view to the mere terms of the verdict.

But the result would doubtless be the same, if we consulted only the principles of justice and expediency.

It is not certain that the negroes that died, would have died, if the defendant had never converted them to his own use. That conversion was a wrongful act. If, therefore, the loss occasioned by the death of those negroes, be made to fall on him, he will not be able to say that he did not bring the loss on himself.

Besides, suppose the negroes that died, had not died, would

the defendant have elected to pay the verdict in negroes or in money? As the evidence stands, it is impossible to say which he would have done.

We think, therefore, that the Court below was right in dismissing the affidavit of illegality.

Judgment affirmed.

No. 4.—STEPHEN SAMPSON, caveator, plaintiff in error, vs. JOHN C. BROWNING, propounder, defendant in error.

[1.] No nuncupative will can be good, "unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect "

[2.] A person, certain of whose words were propounded, as his nuncupative will was at the time of speaking the words, laboring under a wound of which he died in twelve hours, and was in a constant state of stupor, except when aroused from it by the interference of other persons present. *Held*, that the words were to be considered as words spoken, "*in the time of his last sickness.*"

John C. Browning propounded for probate, before the Ordinary of Thomas county, the following instrument in writing, as containing the nuncupative will of Peyton Walden, deceased, and to which Stephen Sampson, one of the heirs, entered a caveat.

STATE OF GEORGIA, County of Thomas

We Hansell Hall, S. Samuel Adams, Samuel Williams, and Ashly Holliday, were present on the evening of the twenty-second day of April, in the year of our Lord one thousand eight hundred and fifty-four, at the house of John Walden, at whose house Peyton Walden died suddenly; a few hours pre-

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vious to his death, the said Peyton Walden, being in the full and perfect possession of his mental faculties, and of sound and disposing mind, did call upon us to take notice and remember what he was about to say, and did in our presence, will and desire to dispose of all his worldly possessions in the manner and form following, to-wit :

Item 1st. He willed and desired that all of his just debts should be paid.

Item 2nd. He willed and desired that John McLean should have and receive the sum of two dollars for each acre of land owned by the said Peyton Walden in the State of Georgia, after the lapse of five years from this date, to be paid to the said John McLean, by his executor, when the said John McLean, should arrive at the age of twenty-one years, or at an earlier period, if his said executor should think the said John McLean capable of taking charge of, and managing said property.

Item 3d. It was his will and desire that Catharine McLean should have and receive the sum of one thousand dollars.

Item 4th. He willed and desired to give to Nackey Simpson, of the State of Kentucky, all his interest in the State of Kentucky, recently left by his deceased father, to be paid and turned over to the said Nackey Simpson by his executor, when the said Nackey Simpson, shall arrive at the age of twenty-one years, or shall be united in marriage.

Item 5th. He willed and desired that John Kindred Walden, should have and receive the whole of the residue of his estate, consisting of lands, negroes, horses, stock, money, bonds, notes or other property of whatsoever kind remaining, after deducting the aforesaid mentioned legacies expressed in the previous items.

Item 6th. He willed and desired, that, in case of the death of the aforesaid John Kindred Walden, before attaining or arriving at twenty-one years of age, then and in that event, that all of the property mentioned in Item 5th, shall go and vest in James Walden.

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Item 7th. He willed and desired that his plantation in the county of Thomas, State of Georgia, should remain in the Walden family, and name of Walden forever.

Item 8th. He willed and desired that his executor should use all fair and honorable means, and incur all necessary expenses, to bring William Holland to a fair and legal trial.

Item 9th. Lastly : He willed and desired to constitute and appoint John Walden of the county of Thomas, and State of Georgia, his true and lawful executor, to fulfill and carry out the provisions and wishes contained in the forgoing items.

Immediately after giving expression to the foregoing wishes and desires, the said Peyton Walden died.

April 25th 1854.

NOTE—The words “after the lapse of five years from this date,” in the second Item and ninth line from the bottom of first page, inserted before signing.

Signed, WM. HANSELL HALL, M. D.
 “ S. SAMUEL ADAMS, M. D.
 “ SAMUEL R. WILLIAMS,
 “ ASHLY HOLLIDAY.

In person appeared before me, Thomas Simmons, a Justice of the Peace in and for said county, Wm. Hansell Hall, S. Samuel Adams, Samuel R. Williams, and Ashly Holliday, who being duly sworn, say that this paper contains the last request and verbal disposition of the estate of Peyton Walden, late of said county deceased, and is just and true in all its parts.

Signed, WM. HANSELL HALL, M. D.
 “ S. SAMUEL ADAMS, M. D.
 “ SAMUEL R. WILLIAMS,
 “ ASHLEY HOLLIDAY.

Sworn to and subscribed before me, this April 25th, 1854.
 THOMAS SIMMONS, J. P.

IN COURT OF ORDINARY OF THOMAS COUNTY,
 December Term 1856
 Upon the agreement of Counsel, it is ordered that the ap-

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plication for probate and record of the will of Peyton Walden, deceased be transferred by appeal to the Superior Court of said county.

Signed, HENRY H. TOOKE, Ordinary.

JOHN C. BROWNING, executor of JOHN WALDEN,

vs.

STEPHEN SAMPSON, caveator.

And now at this term of the Court, comes the defendant by his attorneys, and caveats the application to probate the nuncupative will of Peyton Walden deceased, upon the following grounds to-wit :

1st. Because the said Peyton Walden, at the time of pronouncing said pretended will, did not bid the persons present or any, or either of them bear witness that such was his will or words to that effect.

2d. Because said pretended nuncupative will, was not made in the time of the last sickness of deceased, and in the house of his habitation or dwelling, or where he had been residing for the space of ten days or more, next before the making of such pretended will.

3d. Because it does not appear that said Walden was surprised, or taken sick from his own house, and died before he returned to the place of his dwelling.

4th. None of the foregoing requisites having been reduced to writing within six days after making said pretended will, therefore caveators say pretended will is void.

5th. Because said Peyton Walden at the time of making said pretended will, was not in *extremis*, but had time after pronouncing said pretended will, to have made and signed a written will.

6th. Because after making said pretended will, said Walden lived several hours.

7th. Because the said pretended will, and the words thereof, were drawn by Jno. Walden, from the said Peyton Walden, the said John Walden being interested to establish the same.

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8th. Because sufficient time after the speaking the words of said pretended will, had elapsed before the death of said Walden, to have reduced the same to writing, and to have signed the same.

9th. Because said pretended will was reduced to writing before the death of said Peyton Walden, and not signed by himself or a witness, though he had ample time to do the same.

10th. Because said pretended will, seeks to convey real estate.

11th. Because said Peyton Walden, was not of sound mind and disposing memory at the time of pronouncing said pretended will.

C. B. COLE,
McINTYRE & YOUNG,
Att'y's for caveator.

Brief of evidence for Propounder.

William Hansell Hall, M. D. sworn, says that he was present when Peyton Walden spoke the words, as taken down by witness, and the annexed will was shown him, and he recognizes it as containing what was written down by him at the time. It was at the house of John Walden, his brother, in Thomasville, where he was lying dangerously ill, from a wound received by him. It was eight miles from his own house. He died there about 12 o'clock at night, of the wound he had received. He could not have been removed to his own house. He was in a stupor, but when aroused he was sensible and in his right mind, and capable of doing business, and understanding what he did. He had asked witness on the day before, to notify him when he thought he was going to die, as he wished to make a disposition of his property. On the day he spoke the words witness aroused him and told him he thought he would die, and if he had any arrangements to make about his business, he had better do it. He appeared to think he was not going to die, but when wit-

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ness told him his symptoms, he appeared to think as witness did, and proceeded to make the disposition of his property as set down in annexed paper. He was drowsy and had to be aroused several times. His brother, John Walden, asked him if he did not wish to dispose of his property, and this he repeated several times, as he would seem to fall asleep after speaking a short time. John Walden did not ask him how or to whom he wished to give his property, but only what disposition he wished to make of it. This was asked of him several times by his brother; as he stated how and to whom he wished to give his property, witness took it down on a slate. Does not think Peyton Walden knew of his taking it down. He did not tell him to take it down. Witness took it down, that he might be able to remember, it was afterwards written on paper as witness took it down, and the paper exhibited, is a copy of the one taken down. This was on the 22d day of April 1854, about 12 M. and he died about 12 o'clock at night. About two hours after his speaking the words, witness went to Peyton Walden, and aroused him, and asked him what he had done with different portions of his property, and his replies corresponded with what witness had written down on the slate. He was in his proper mind and able to have made a written will and continued in his right mind for some time after. He was able to have made a written will at the time he made this nuncupative will. He was able to have done it two hours after. There was ample time and he had sufficient mind to have dictated and strength to have made his written will, two hours after he made his nuncupative will. He would go off in a stupor, but when aroused had sufficient mind to make a will. He did not bid any of the persons nor any of them to take notice that what he was saying was his will. He appeared to understand and know what he was doing. John Walden asked persons present, to remember what his brother was saying. Peyton Walden could have heard him, but he did not appear to notice it. He said nothing

about witnesses, or witnessing what he was saying. The only persons present that witness remembers, were Dr. Adams and John Walden. Witness did not intend, in the affidavit made before Thomas Simmons, on the 25th day of April 1854, to swear that Peyton Walden asked or requested the parties present, or any of them to bear witness, that what he was going to say was his will or any words to that effect, for he said nothing on the subject. Thinks Peyton Walden's estate worth fifteen thousand dollars or more. Peyton Walden seemed to understand fully at the time that he was making a will, and the witnesses that they were witnessing a will.

Dr. Samuel Adams sworn, says: He was present when Peyton Walden made some verbal disposition of his property. Thinks the paper produced contains this disposition. He was competent at that time to make a will, he was of sound mind. It was on the 22nd day of April, 1854, about 12 o'clock in the day, he lived until about 12 o'clock at night, and was able to have made a written will at the time of speaking the words of his nuncupative will. Dr. Hall, Samuel Williams and Ashly Holliday, were present. He said he wished to make a disposition of his property, and did make the disposition as is contained in the paper exhibited, a copy of which is here attached; he was drowsy, and had to be aroused several times. He did not ask the persons present, or any of them, to bear witness or take notice of what he was saying, or about to say. He said nothing on the subject. John Walden did though, but don't know that Peyton Walden heard him. Witness did not intend to swear in the affidavit made before Thomas Simmons, that Peyton Walden called upon them, or any of them, to take notice and remember what he was about to say, for he did not say any such thing or any thing like it. Thinks Peyton Walden's estate worth ten thousand dollars or more. There was ample time between speaking the words and his death, to have made a written will, and he had mind and

strength sufficient to have done it at any time during the afternoon. Witness mentioned the subject to Peyton Walden, soon after he made this will, and he remembered what he had done about the disposition of his property. Peyton Walden appeared to know very well that he was making a will, and the witnesses all seemed to understand that they were witnessing his will.

Thomas Simmons sworn, says : He swore Dr. Hall, Dr Adams, Ashley Holliday, and Samuel Williams, to the affidavit attached to the writing as containing Peyton Walden's verbal will. It was on the 25th of April 1854.

It was agreed that the testimony of the other witnesses be dispensed with, they being out of the jurisdiction of the Court, and also agreed that proof of Sampson being an heir at law be dispensed with.

The Court read to the jury, the 19th section of the statute of frauds, relating to nuncupative wills, and charged them that the propounder must prove all the requisites of that provision of the statute, before the paper offered, could be set up as a nuncupative will, and if he had failed to prove all, or any of said requisites, they should find for the caveator ; he further charged, that if the deceased was not in *extremis*, when he spoke the words, they could not be set up as a nuncupative will ; that if they believed the propounder had made out his case, they could find in favor of the writing, as a will as to the personal property, but against it, as to the real estate attempted to be disposed of. To which last charge counsel for caveator excepted.

The jury returned the following verdict :

" We the jury, find that the will be sustained, except so far as concerns the real estate conveyed therein."

And counsel for caveator, moved to set aside the verdict, and for a new trial, on the ground that the verdict was against the evidence, the law, and the charge of the Court.

The Court overruled the motion, and refused to grant a new trial, and counsel for caveator excepted.

COLE and BAILY for plaintiff in error,

SEWARD and HANSELL, represented by HARRIS and WARREN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Should the motion for a new trial have been granted ?

The plaintiff in error contends, that there were two grounds sufficient to support the motion.

1st. A want of proof to show that the "testator, at the time of pronouncing" the words propounded as his will, "did bid the persons present, or some of them, bear witness that such was his last will, or to that effect."

2nd. A want of proof to show, that "such nuncupative will" was "made in the time of the last sickness of the deceased."

It is true that there was no evidence going to show, that the "testator" bid the persons present, or any of them to bear such witness.

Ad the statute says, "that no nuncupative will shall be good, where the estate thereby bequeathed, shall exceed the value of thirty pounds," unless several things concur, among which is this; that "it be proved that the testator, at the time of pronouncing the same, did bid the persons present or some of them, to bear witness that such was his last will, or to that effect." *Pr. Dig.* 917. Yet, the verdict says, in effect, that the will shall be a good nuncupative will, except as to the realty.

The verdict consequently, is contrary to the Statute. We think therefore, that the plaintiff in error is right, in the first of his two grounds.

But we cannot say, that we think he is right, in the second of those grounds. We cannot say, that we think that there was a want of evidence to show the words in question, to have been spoken, "in the time of the last sickness" of the speaker. We think that the evidence showed the words to have been spo-

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ken in the time of his last sickness. What the evidence did show, in this respect, was this: that the speaker, at the time when he spoke the words, was lying mortally wounded; that he died of the wound, twelve hours after speaking the words; that his condition was that of stupor, from which he had to be aroused, to enable him to speak at all, and into which he would relapse as soon as left to himself; that when he was aroused from this stupor to make this will, he spoke some of the words of the will, and before they could be written down he relapsed again into the stupor; that this scene was repeated several times, before all the words were spoken and taken down.

Such being what the evidence showed on this point, we cannot feel any hesitation in saying, that we think that it showed the words to have been spoken, "in the time of the last sickness" of the speaker. Not to say so, would be to give a meaning, extremely restricted, and quite arbitrary, to the expression, "in the time of the last sickness," contained in the statute. *Id* 917.

Judgment Reversed.

No. 5.—SAMUEL D. VARNER, next friend, Caveator, plaintiff in error vs. ARTEMUS GOLDSBY, propounder, defendant in error.

- [1.] The Court may order to be entered on the minutes of the Court the consent of a party to the suit, that the opposite party and his security on the appeal, be examined fully as witnesses, and such consent not only makes them competent, but precludes objection to their credit on account of their relation to the case as parties.
- [2.] Next of kin not generally liable for costs on calling executor to prove will in solemn form, as when the proceeding is not vexatious.

Caveat to will, from Jasper Superior Court. Decision by Judge HARDEMAN, April Term, 1857.

Verner vs. Goldsby.

Samuel D. Verner, as the next friend of Caroline E. Verner, an infant, caveated the will of Jeremiah Pearson, deceased, and the executor Artemus Goldsby, was called upon to prove said will in solemn form of law.

The case came before the Superior Court upon appeal from the Ordinary. Upon the call of the case, the parties being asked by the Court, if they were ready for trial? Counsel for caveator, showed that Caroline E. Verner was an infant of about nine years old, and the grand daughter of the said Jeremiah, that she was poor and without any estate or property; that her next friend, the caveator, Samuel D. Verner, was a material witness against said will, and in behalf of said infant; and for the purpose of rendering him a competent witness, submitted a motion, that said Verner be dismissed as the next friend, and discharged from his connection with this case, upon the payment of the costs that had accrued; and that some fit and proper person be appointed by the Court to act as next friend and guardian *ad litem*, *in forma pauperis*, of said infant. The Court, upon objection by counsel for propounder, refused the motion, but decided that upon some other person, with the assent of the security on the appeal, appearing and being substituted in the place of said Samuel D., he might be released and discharged as next friend, and party.

To which ruling and decision counsel for caveator excepted.

Counsel for caveator, further showing that Andrew J. Verner, the security on the appeal, was a material witness for caveator, moved that he be discharged as security on said appeal, and from his connection with the case, with the view of rendering him a competent witness. At the same time caveator proposed to make oath that he was not a resident of the county of Jasper, and from his indigent circumstances, was unable to give other security on the appeal: counsel for propounder objected, and the Court held, and adjudged that,

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said security be discharged upon caveator substituting other good and sufficient security in his place. Before the decision of the Court was pronounced, counsel for propounders tendered the following:

"It is agreed by the propounder in the above case, that Samuel D. Varner, next friend of Caroline E. Varner, and Andrew J. Varner his security on the appeal, be considered as witnesses in the case, and be examined as fully as if they were not parties to the record. And the Court orders this to be put upon the minutes."

W. W. ANDERSON,

Atty. for propounder.

To which decision, counsel for caveator excepted.

J. A. BOYNTON, BAILEY, BARTLETT and LOFTON, for plaintiff in error.

W. W. ANDERSON, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] Before the Court announced its decision upon the motion submitted by caveator's counsel, to discharge the security on the appeal, for the purpose of rendering him competent to testify on his side of the case, the counsel for propounder signed a written consent that both the *prochein ami*, and his security on the appeal, should be considered as witnesses in the case, and be examined as fully as if they were not parties to the record, which consent the Court ordered to be put on the minutes. The consent thus given, for the examination of the witnesses, accomplished all that the motions submitted, proposed to effect—to allow them to be examined as legal witnesses in the cause.

The ordering the consent to be entered on the minutes was a virtual rejection of the motions to dismiss the *prochein*

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ami, and to discharge the security on the appeal. It is urged by counsel for plaintiff in error, that the consent that parties may be examined as witnesses, leaves them open to impeachment by counsel, because of their relation as parties to the case.

This is a wrong interpretation of the consent. They are to be examined *as fully as if they were not parties to the record*. The Court would not allow a party to avail himself of the position of witnesses as parties to the record to assail their credit, when his consent to consider them as witnesses, had induced the Court to retain them in that position. The waiver was in lieu of their discharge from the case, and must be as effectual in all respects. The only objection to them, according to the decision of this Court, is their liability for costs, and if they ought not to be held liable for costs, they ought not to be excluded from testifying. *Central R. R. & Bnk. Co. vs. Hines, Perkins & Co.*, 19 *Ga. Rep.* 203. Samuel D. Varner is the next friend only, and has no interest in the event of the suit, if he be not liable for costs. His security on the appeal can have no greater interest than he has, in the result of the cause. Samuel D. Varner, as the next friend of an infant who is one of the next of kin of the testator, calls on the executor to prove the will in solemn form. The record shows that the infant is poor, without the means of paying the costs, on the termination of the suit unfavorably to her object. But independent of her circumstances, she would not be liable for costs, unless the proceeding is unjust and vexatious. She calls on the executor to prove the will in solemn form. That is all. The executor might have done that in the first instance. Perhaps it was his duty to have done it. This infant is one of the next of kin of the intestate and as such is a favorite of the law. The "interests of the next of kin, in cases of intestacy, accrue by mere operation of the law, and they have the plainest and most undoubted right to be satisfied, that those interests are not defeated, but

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upon good and sufficient ground." *Urquhart & Waterman vs. Frieber*, 2 *Eng. Eq. Rep.* 425. The next of kin have a right to put executors on proof of the will, and this has been assigned as a reason for not giving costs. *Reeves vs. Freeing*, 1 *Eng. Ec. Rep.* 185. Costs may be given, however, against the next of kin when the proceeding is vexatious.

[2.] The spirit of our Legislation is, that the doors of justice shall be closed against none, on account of poverty. If this were a case in which the party would be liable for costs on the establishment of the will, if she were of full age and unable to pay, she might have appealed without giving security. Because she is an infant, she is not to be subjected to greater hardships, nor is one who, from motives of parental duty, or a sense of justice, steps forward to her relief, to be forced to assume a responsibility which would not have rested on her if she had been of full age.

We think that there was no necessity for the substitution first moved for, and the consent of the propounder of the will placed on the minutes of the Court rendered a decision of the motion to discharge the security on the appeal unnecessary, and no express decision was made on that. There was no error committed by the Court in ordering the consent to be entered on the minutes of the Court. We shall affirm the judgment of the Court below, with instructions to require the propounder of the will to conform the language of his consent to the interpretation herein given of it, as being more calculated to relieve the witnesses from the imputation of bias growing out of their position as parties, than a mere construction of the consent as it stands.

Judgment affirmed, with directions.

No. 6.—JOHN B. FITTS, and others, plaintiff in error, vs. HERSCHEL V. JOHNSON, Governor, for use &c., defendant in error.

[1] Evidence was rejected that was properly admissible, but if it had been admitted, it ought not to have changed the verdict. No motion was made for a new trial.

Held. That the rejection of the evidence, was not a sufficient cause for a new trial.

[2] If the Sheriff pay over money coming to the defendant in the *f. fas.* to some debt of the defendant's which is not entitled to the money: yet the Sheriff will be protected in the act, if he so paid the money, by the order of the defendant.

Debt on Sheriff's Bond, from Putnam Superior Court. Tried before Judge HARDEMAN, March Term, 1857.

This was an action of debt brought for the use of William G. Lee, on the official bond of the Sheriff of Putnam County, against the Sheriff and his securities, for failing to pay over to Lee the balance in his hands, amounting to one thousand one hundred and thirty-five dollars and ninety cents, arising from the sale of negroes sold under general executions against Lee; and which balance it was alleged remained, after satisfying said executions.

The plaintiff offered in evidence the Sheriff's official bond.

He next offered a *rule nisi* against the Sheriff, reciting, that he having raised from sale of Lee's property, fifteen hundred dollars, and after satisfying the executions levied upon, that there will remain in his hands a balance, and ordering him to show cause why the same should not be paid to Lee; and the rule absolute at the same term of the Court, March, 1855, ordering the Sheriff to pay over to him the sum of one thousand one hundred and thirty-five dollars and ninety cents, as said balance.

Here the plaintiff closed.

Defendant then offered in evidence sundry *f. fas.*, which

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were in his hands against Lee, at the time of the sale of the property, amounting to five hundred and sixty dollars.

Lewis P. Harwell testified, That on the evening of the sale of Lee's negroes by the Sheriff, 6th June, 1854, Lee directed the Sheriff to pay out of the proceeds of the sale of his property, his note to the Branch Bank at Eatonton, for two hundred and nineteen dollars, endorsed by Scarsbrook; and that Fitts did pay it. Lee was drunk at the time, but not so much so as not to know what he was about.

It was admitted by defendants, that on the day of sale, William H. Scarsbrook gave notice before the sale, that he held a mortgage on the property.

Harwell further testified, that he did not know whether Fitts heard the notice given by Scarsbrook or not, but that he was present.

The Court then admitted the Bank note in evidence, saying that it would charge the jury as to that note, as the law and facts of the case required. Defendant's counsel then offered to introduce two mortgages on said negroes, and *fi. fas.* thereon: one from Lee to Elmore Calloway and Lewis P. Harwell for the sum of seven hundred and fifty dollars, besides interest and cost; the other from Lee to Lewis P. Harwell for the sum of two hundred and forty-eight dollars and seventy-seven cents, besides interest and cost, and which *fi. fas.* were in the Sheriff's hands on the day of sale, and both receipted in full to the Sheriff by the respective parties on the day of the sale of the said negroes; the aggregate of said receipts amounting to one thousand and thirty dollars and eighty-seven cents.

Before receiving these papers in evidence, Lewis P. Harwell was again examined, who stated, that Fitts the Sheriff had recovered back from Calloway and himself the amounts he had paid and allowed to them on their mortgage *fi. fas.* These amounts were paid in settlement by the Sheriff, they being the purchasers of the negroes at the Sheriff's sale, on the first Tuesday in June, 1854. That notice of said mort-

gages was given at the sale, and that the negroes were sold subject to the mortgages; that he did not know that the Sheriff knew that the notice was given, but he was present and as Sheriff sold the negroes.

The Court ruled out the mortgage *fi. fas.* and the oral testimony of Harwell, which however was before the Court and jury, and counsel for defendants excepted.

Wm. C. Davis testified, that on the day of sale, after the negroes were sold, he went to where the Sheriff was settling with Calloway and Harwell, and understanding that they were about to apply the proceeds of the sale to the mortgage *fi. fas.* said that it was wrong, as the property was not subject to the mortgages; when Harwell said, "say nothing about it, and your execution shall be paid."

Defendants here closed.

The Court charged the jury, among other things, that in reference to the note to the Bank, if they believed that Fitts knew of the notice of the encumbrance of the mortgage to Scarsbrook, and that said mortgage was given to indemnify him against his indorsement on said note, then the jury should not allow the same as a credit to the Sheriff in their verdict; but if they believed from the evidence that Fitts did not know of the proclamation of the lien of Scarsbrook's mortgage at or before the sale, then they should allow it as a credit to defendants—it being admitted by defendant's attorney that notice of the mortgage was given.

To which charge defendants counsel excepted.

The jury found for the plaintiff the sum of eleven hundred and one dollars and twenty-six cents.

Whereupon counsel for defendants tender their bill of exceptions, and assigned the said rulings and charge, as error.

JOHN W. HUDSON, for plaintiff in error.

F. H. CONE, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Lee in his declaration alleges, that Fitts, as Sheriff, sold certain of his, Lee's negroes, to satisfy several general *fi. fas.* against him; That the negroes sold for more than enough to satisfy the *fi. fas.*; and that Fitts refuses to pay over to him the surplus.

The defence of the Sheriff (and his sureties) seems to be, that he paid this surplus to certain mortgages on the negroes, made by Lee, viz: a mortgage held by Calloway and Harwell; a mortgage held by Harwell; and a mortgage held by Scarsbrook; and that he did so by the direction of Lee.

To make out this defence, the defendants offered as evidence, the first two of the aforesaid mortgages, together with the judgments of foreclosure on them, the *fi. fas.* issued from those judgments, and the receipts in full, given to the Sheriff by the mortgagees; and also offered as evidence the testimony of Harwell, to the effect, that Fitts, the Sheriff, had recovered back the money paid or allowed by him to the said mortgagees, and for which they had given him the said receipts: they also offered evidence to show, that Lee was willing that the mortgagees should be paid out of the money raised by the sale of the negroes.

The Court rejected the whole of this evidence, and that is excepted to.

It is to be remembered, that the negroes were sold subject to the mortgages.

Was the foregoing evidence admissible? We think that it was. A part of it went to show, that the Sheriff paid the money to the mortgagees in obedience to instructions proceeding from Lee himself, the owner of the money. This part, therefore, would have been in support of the defence to the action.

Another part of the evidence, however, went to show that if it was true, that the Sheriff had paid the money on the

mortgages, it was equally true, that he had afterwards recovered it back.

Now when he had recovered the money back, he held it, we may presume just as he had held it before he paid it over to the mortgagees, and he had held it before he had paid it over to the mortgagees, as the money of Lee, the negroes having been sold subject to the mortgages. The recovery back was evidence, that for some reason, the payment of the money to the mortgagees was an improper payment, and therefore, was evidence, that the money still, in law, belonged to Lee.

This being so, the part of the evidence aforesaid that showed that the Sheriff had recovered back the money, neutralized the part that showed that he had paid the money on the mortgages under the instructions of Lee.

If therefore, the evidence in both its parts as offered, had been received, it could not have changed the verdict.

This being so, a new trial ought not to be granted, although, it is true, that the rejected evidence was admissible; for a new trial, with that evidence in, ought not to result in a different verdict.

The new trial Act 1854, does not apply, as no motion was made for a new trial.

[1.] We cannot, then, hold the first exception good.

In relation to the "Bank note," this may be said:

It seems, that there was a note of Lee's in Bank, on which Scarsbrook was an endorser; that Scarsbrook held a mortgage on the negroes aforesaid, for his indemnity as such endorser, and that the negroes were sold subject to the mortgage. But it also appears, that Lee directed the Sheriff, to apply a part of the money arising from the sale of the negroes, to the payment of this note, and that the Sheriff accordingly, did so apply a part of the money; and it does not appear, that the Sheriff ever recovered back *this* part.

[2.] Now the money thus paid away by the Sheriff, belonged to Lee, and Lee might do with it whatever he pleased. He might, therefore, order the Sheriff to pay it on the note,

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notwithstanding that the note might not be entitled to it, and if he did, the Sheriff would be justified in obeying the order. And no action can lie against a man for doing what he is justified in doing. Unless, therefore, the Sheriff had recovered back this money, as he had that which he paid to the two mortgagees, there could be no action against him for this money.

Now, the charge of the Court in reference to this note, amounts to this, that the Sheriff was liable, whether it was by the order of Lee the owner of this money or not, that he had paid away the money on the note, provided he knew of Scarsbrook's mortgage.

This charge, therefore, we think was wrong.

And if wrong, the error was manifestly such as to require a new trial.

Accordingly a new trial is ordered.

**No. 7.—WILLIAM H. HENDRY, guardian, plaintiff in error,
vs. JAMES M. HURST and wife, defendants in error.**

- [1.] On an appeal from the Ordinary on a guardian's return, the account offered by the guardian, must be submitted to the jury as the matter he proposes to prove, but the vouchers do not go as a matter of course.
- [2.] Vouchers embracing charges for several years board, clothing, tuition, &c. specifying the time and amount claimed, are not too general to be admitted in evidence to the jury; but when accounts are thus presented they ought to be strictly proved.
- [3.] Guardian's receipt to himself is no evidence to support a charge in his own favor against his ward.
- [4.] When the charges are specific in regard to the object, time and amount, evidence may be admitted to prove them.
- [5.] Attorneys receipts to guardian, stating to be for professional services rendered the ward, are not of themselves, without further proof, sufficient to establish the account against the ward.

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[6.] A party may voluntarily release a part of a finding in his favor when it does not prejudice his adversary.

Caveat to Return, and Vouchers of Guardian, &c., from Thomas Superior Court. Tried before Judge Lovv, December Term, 1856. On Appeal from Ordinary.

William H. Hendry, guardian of Georgia Ann Hendry, presented his return with the vouchers, to the Court of Ordinary of Thomas county, to which being allowed and admitted to record, James M. Hurst, in right of his wife, the said Georgia Ann, entered his protest and caveat.

The following is the return :

William H. Hendry in account current with Georgia Ann Hendry, minor of Eli H. Hendry.

To cash paid for the schooling, clothing and tuition of said Georgia Ann, from 1st January, 1848, to the 17th April, 1855, No. 6, \$500 00

To board of Georgia Ann Hendry, from 1st January 1848 to 17th April 1855, No. 7, 500 00
1855.

March 6. To cash paid McIntyre & Young as per voucher, No. 1, 50 00

May 30. do. do. H. H. Tooke, Ord^y. No. 2, 14 30

June 2. do. do. C. B. Cole, No. 3, 150 00

June 2. do. do. McIntyre & Young, No. 4, 150 00

May 7. do. do. R. J. Bruce, No. 5, 29 00

Commissions on cash received at 2½ per ct. 95 51

do. do. paid out, 94 83

\$1,523 64

1854.

Nov. By notes received this day from Alderman Carlton, adm'r of James E. Hendry,

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deceased, who was the adm'r of E. H.
 Hendry, father of Georgia Ann Hendry, 3,600 75
 Deduct credits opposite page, . . . 1,523 64
 Leaves balance due minor, . . . \$2,277 11
 WM. H. HENDRY, *Guardian*.

Sworn to and subscribed before
 me in open Court, June 2d, 1855. }
 H. H. TOOKE, *Ordinary*. }

To this return was annexed vouchers for all the items charged to have been paid out or disbursed.

Hurst in right of his wife, by counsel, on the 21st June, 1855, entered his caveat against the foregoing return and vouchers, and objected.

1st. To first charge for schooling, &c., because the same is erroneous and unjust, and no voucher has been presented for the same.

2d. To second charge for board, because the same is unjust and erroneous, and because at the time when said charges were made Hendry was not guardian.

3d. He caveats the charge of fifty dollars paid McIntyre & Young, for making returns, as illegal and not a proper charge against ward.

4th. He also caveats the two expenditures to McIntyre & Young and C. B. Cole, each for \$150 00, as illegal, being for professional services rendered in defending himself in a suit against him for mal-administration as guardian.

5th. Caveats the charge for commissions, the guardian not having made his returns agreeably to law, and because charged upon payments and expenditures which were not made.

6th. Caveats the charges for board, tuition and clothing, the same never having been contracted, and if so are barred by the statute of limitations; and further because the expenditures charged were made before the appointment of the guardian.

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that the verdict was contrary to law, the charge of the Court, and against the evidence.

The account current and vouchers were offered together and ruled out by the Court, but the return or account current itself, was admitted and read to the jury, and counsel for guardian excepted.

Vouchers Nos. 6 and 7, were then offered, which were for the board and tuition and clothing of the ward, and which consisted of the account made out as contained in the return, and a receipt of the same by the guardian to himself of one thousand dollars the aggregate of the two items. The Court rejected them, on the ground, that the charges were too general, and counsel for the guardian excepted.

Vouchers Nos. 3 and 4, for fees paid to C. B. Cole, and McIntyre & Young for professional services, \$150 to each, were offered, and upon objection, were ruled out by the Court, on the ground, that said receipts did not specify for what particular services the money was paid, and because the same was paid for the defence of a suit instituted against Hendry on his guardian bond: to which ruling the guardian excepted.

Counsel for guardian offered the deposition of two witnesses examined by commission, in support of the two items in the return for tuition, clothing and board, being Nos. 6 and 7, which were upon objection, rejected by the Court, on the grounds that the two items were too general, and no evidence could be received to prove them; and counsel for guardian excepted.

The jury found the following verdict:

“We, the jury find that the guardian, William H. Hendry, be allowed on his account the sum of ninety-three dollars and thirty cents, the gross amount of Ordinary’s bill, (voucher No. 3;) McIntyre & Young’s receipt for \$50, (voucher No. 4;) and R. J. Bruce’s receipt for \$29, (voucher No. 5;) and disallow the other items charged in account.”

Counsel for Hendry moved for a new trial, on the ground,

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Before the motion for a new trial was decided, counsel for Hurst and wife, came in and filed their written consent to admit and allow commissions in settlement with the guardian.

The motion was then overruled and new trial refused; and counsel for Hendry the guardian, excepted.

COLE, for plaintiff in error.

SEWARD & HANSEL, represented by IVERSON L. HARRIS, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The record does not disclose the decision of the Ordinary on this case, when before him. We presume, however, that he allowed the account of the guardian, and considered the vouchers sufficient to sustain it, as the counsel for guardian in his argument insisted that the Court below ought to have permitted the account and vouchers to have been submitted to the jury, as, when passed by the Ordinary, the vouchers were *prima facie* evidence of the disbursements charged to have been made. Be that as it may, when the case was about to be submitted to jury, "the counsel for the guardian offered the account current and vouchers returned to the Court of Ordinary as the case and pleadings for trial." The Court rejected them, and this ruling is the first ground of error alleged in the record.

The appeal from the decision of the Ordinary, brought up the entire case and it ought to have been presented to the jury as it was to the Ordinary. In all cases the guardian making his return should lay his account before the Ordinary, plainly setting forth, with sufficient certainty, his charges against his ward. This account is the case he should prove. The vouchers are his evidence to support it, and they should be closely examined, and, if not satisfactory to the Ordinary,

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ought to be supported by other proof. So, in the Superior Court on appeal, the same course should be pursued. The vouchers, on such appeal, are entitled to no weight as evidence, on the score that, on the case appealed, the Ordinary allowed them. The judgment appealed from must be affirmed before it is entitled to any consideration as evidence, and it being a judgment upon the law and evidence, it must be reviewed upon the law and evidence. The Court below ought to have allowed the account to go to the jury, as the matter which, with the caveat, made up the issue to be tried by them. The vouchers formed no part of the issue and when offered as a part thereof, ought to have been rejected.

[2.] The vouchers to sustain the charges in the guardian's account for clothing, schooling, tuition and board, ought not to have been rejected on account of their generalness. They embrace charges from the 1st of January, 1848, to 17th April, 1855. They show great carelessness and negligence in the mode of keeping the accounts, but this is not a reason for rejecting them altogether; accounts thus kept, ought to be strictly proven by testimony, to support the charges made, to-wit: that the clothing, schooling, tuition and boarding, were furnished in accordance with the charges, and that the charges are reasonable and suitable to the circumstances of the ward. Guardians should keep accurate accounts and make regular returns, and in all cases where they do not, and are unable to prove the actual amount paid under the above rule, they ought to be restricted to the lowest amount the law would authorize them to charge. The guardian's own receipt to himself, furnishes not the slightest evidence of this. It is his own bare statement in his own behalf which is inadmissible. He ought to prove the furnishing, and a *quantum meruit*, (if unable to prove the actual amount paid,) and that the circumstances of the ward justified the charges.

[4.] The depositions of Robert and James B. Peacock, ought to have been read to the Jury. The charges in the account were sufficiently special to apprise the defendant's

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in error of the nature of the demands set up by the guardian. It is by the evidence of others that he must prove them. If the testimony of the persons with whom the ward boarded, and the teachers to whom the tuition money was paid, can be obtained, it is the best evidence. If that cannot be obtained, the next best evidence must be produced. The evidence rejected ought to have been submitted to the consideration of the jury. The witnesses testified that the value of the ward's board with the guardian was fifty dollars per year, and that she lived at his house six or seven years, and was clothed and supported by him. To this extent the evidence was certainly admissible.

[5.] The Court below rejected receipts given by attorneys for professional services rendered the ward's estate, on the ground that they did not specify the services rendered, and because it was alleged, that the said services were rendered the guardian in his defence of a suit on his guardian's bond. There is nothing in the record to justify the second ground of objection, and it will not be considered. The receipts ought not only to have specified the services rendered, but if the ward required it, there should have been evidence that it was a proper charge against her. The judgment of the Court upon a contested return to the Ordinary, is as conclusive upon the parties, as any judgment, and the proof ought to be such as would be necessary to sustain the charges if attempted to be set up in a Court of Chancery. Indeed whether contested or not, there ought always to be satisfactory proof that services charged against a ward were rendered for his or her benefit, and that the charge is reasonable.

[6.] It was not error in the Court, to permit the party to allow, in favor of the guardian, items in his account not allowed by the jury. It was a voluntary abandonment of a right which, by no possibility, could prejudice the other party. The non-allowance of commission does not seem to have been a ground for refusing the motion for a new trial.

The judgment of the Court below must be reversed on

the ground that the Court erred in excluding the evidence of Robert and James B. Peacock. It was the duty of the Court and jury on the appeal to exercise all the duties and powers of the Ordinary, to hear all the evidence legally offered for or against the account as charged, admit it, or disallow it, or reduce it, accordingly as the evidence demanded the one or the other.

Judgment reversed.

No 8.—Morgan M. Mills, administrator, plaintiff in error, vs. Nathaniel S. Glover, defendant in error.

- [1.] Under proceedings to obtain a restoration of personal property to the possession of a party from whom it has been taken without his or her consent, neither the right to the possession, nor the title to the property can be investigated. ✕
- [2.] After the expiration of four years from the taking, a possessory warrant will not lie, the party having had the possession in the mean time without disturbance.

Possessory warrant, from Jones Superior Court. Decision by Judge Hardeman at Chambers, 24th April, 1857.

On the 23d April, 1857, a possessory warrant issued at the instance, and upon the affidavit, of Morgan M. Mills, administrator of John Towles deceased, against Nathaniel S. Glover, to recover the possession of a large number of slaves, some forty-five or fifty, alleged to be the property, and in the possession of affiant's intestate, at the time of his death, and which were shortly thereafter taken and carried off illegally and without lawful authority, by Glover.

The following statement of facts was agreed upon by the Counsel, viz :

That Towles died in the possession and control of the negroes; that Glover took possession of them and carried them off

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from Towles' plantation to his own, after the death of Towles, and that he now has possession of the same; that Glover took them openly in the day time, and without violence. That when he took possession, he said he did it by virtue of a deed from Towles to himself, which he exhibited; that the negroes mentioned in said deed are the same, with their increase, now sought to be recovered.

That Towles died on the 27th day of November, 1852, and Glover took possession of the negroes on the 16th day of December, 1852, and that letters of administration were granted to Mills 2d May, 1853.

Mills objected to the admissibility in evidence, in excuse, justification or maintenance of Glover's possession, what he said or did in relation to said deed, at the time he took the negroes; the testimony was heard subject to this objection.

After the testimony was closed, and during the argument, Counsel for Mills offered to prove by three witnesses, that he made a demand upon Glover for the negroes on the 9th day of January, 1856, which the Court refused to allow. Counsel also offered to introduce Mills' letters of administration to show that the statute of limitations did not begin to run till the date or period of granting said letters; this the Court also refused, for the purpose intended, but permitted the letters to be read, to show that Mills was the administrator. To which rulings counsel for Mills excepted.

Judge Hardeman, after hearing argument, dismissed the warrant, on the ground that Glover had been in possession more than four years before the same was issued. And Counsel for Mills excepted.

BAILEY, NESBIT and GIBSON, for plaintiff in error.

POE, and GRIER, for defendant in error.

By the Court.—McDONALD J. delivering the opinion.

On the preliminary motion made in this case we pronounce.

no judgment, but will pass at once to the consideration of the questions presented in the record.

On the return of the warrant the plaintiff in error offered to prove that he had demanded of Glover the negroes, and tendered in evidence, his letters of administration to show that the statute of limitations did not run till the issuing of the letters of administration. The judge refused to hear both, and his decision was excepted to. The only matter before the Judge was the question of possession. Neither the right of possession nor the question of title could be heard by him in this proceeding.

If the object had been to prove that the letters related back to the death of the intestate, to show that the taking was from his constructive possession, then, more than four years had passed since the taking from that constructive possession.

If the object was to show that the action of trover, was not or would not be barred, that was an issue which involved the title or right of possession, and not the naked question of possession, which the Judge alone could hear. There is no act of limitations to possessory warrants; but from the object of the Act, the purpose and intent of the Legislature to restore, at once a possession of which a party had been deprived surreptitiously or by fraud or violence, and from the affidavit, the party must make, in case the property was taken in a manner unknown to him, that the property was "recently" in his possession, I should be disposed to hold, that the party losing the property should proceed with all reasonable dispatch to obtain a restoration of the property to his possession, but for the proviso at the close of the first section of the statute, that no person shall be committed for refusing to produce the property, when it shall be proven to have been in his possession for four years, next preceding the issuing of the warrant. But it does not necessarily follow from the provision in the act prohibiting, after the expiration of four years, the imprisonment of the party failing to produce the property, when it had been clandestinely taken and concealed

and out of reach of the arrest of the Sheriff, that the party losing the possession should have four years to institute proceedings where the taking was open, and the possession public and notorious. We think there was no error in the refusal of the judge to hear the letters of administration. The demand could not, if proven, have been evidence of the resumption of the possession. This Court has held that the levying on land by an officer is no interruption of the peaceable possession of the occupant of the land. *Lessee of Gittens vs. Lowry*, 15th Geo. Rep. 339.

The judge who issued the possessory warrant, after hearing the evidence touching the possession of the negroes, dismissed it at the cost of the affiant, on the ground that Glover had been in possession of the negroes for four years next preceding the issuing of the warrant.

The sole matter of enquiry in this case was respecting the possession of the property. The affidavit of the injured party is the foundation of the proceeding. It has for its object, the change of the possession of property, and excludes the trial of the right to the possession or the title to the property. It is a proceeding unknown to the common law. It is prescribed by statutes. The party being entitled to the remedy by statute alone, must pursue the statute. The oath required by the statute, must be made by the party. The statute requires that the party should depose that the property was taken, enticed or carried away by fraud &c., "*from the possession of the deponent,*" or, that the property "*having been recently in the quiet, and legally, and peaceably acquired possession of the deponent, &c.*" The party in this case, claiming to have been injured, deposes "that after the death of John Towles, to-wit: on the 16th day of December, eighteen hundred and fifty-two, or on some other day near about that time, one Nathaniel S. Glover, of said county of Jones, as the deponent is informed and believes, illegally and in fraud of the law, took without lawful authority and carried away said negro slaves from the peaceably and lawfully acquired posses-

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ion of *John Towles*, which possession devolved," &c. The property was not taken from the possession of the party making the affidavit. The deposition so states. I am not prepared to hold that a constructive possession will authorize the proceeding. The statute deals entirely with the actual possession. But admitting it did, the claimant's constructive possession, did not extend beyond the time that Glover obtained the actual possession. The time of the granting of the letters has nothing to do with the question of possession under this statute. The possession of Glover was of more than four years duration, and we believe the order of the Judge dismissing the warrant was right and proper.

Judgment affirmed.

NO. 9.—MARTIN B. EVERETT, and REUBEN B. HARRELL
 Ex'ors, plaintiffs in error, *vs.* **JAMES M. MOUNT, Adm'r.**
 defendant in error.

The fourth item of the will contains the following words: "I desire that the balance of my property shall remain together until my youngest child comes of age, each to be clothed and educated out of my estate, equal with my other children, and my estate to pay them one thousand dollars as they come of age; and when my youngest child comes of age, I wish an equal division of the balance of my property," &c. One of his daughters died before she arrived at the age of twenty-one years, and the bill is filed by her administrator, claiming the legacy. The bill was demurred to, on the ground, that the legacy did not vest in the intestate.

Held, That the legacy vested on the death of the testator.

In Equity, in Pulaski Superior Court. Decision on demurrer, by Judge LOVE, at October Term, 1856.

James M. Mount, administrator of his wife, Margaret Elizabeth Mount, deceased, formerly Margaret Elizabeth Harrell,

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filed this bill against Martin B. Everett and Reuben Harrell, executors of the last will and testament of Miles Harrell, deceased, for an account and settlement of the estate of said testator, and for recovery of the legacy and estate coming to his late wife, under said will.

The following is the last will and testament of Miles Harrell, under which complainant claims, and upon the construction of which the questions made by the demurrer, arises, viz:

GEORGIA, } In the name of God, Amen. I, Miles
Pulaski County. } Harrell of said State and county, being of
advanced age, and knowing that I must shortly depart this
life, deem it right and proper, both as it respects myself and
my family, that I should make a division of the property of
which a kind Providence has blessed me. I therefore make
this my last will and testament, hereby revoking and annulling
all others heretofore made by me.

Item First: I desire and direct that my body be buried in a decent and christian-like manner, suitable to my condition and circumstances. My soul I trust, shall return to rest with God, who gave it, as I hope for eternal salvation through the blessed Lord and Saviour Jesus Christ, whose religion I have professed, and as I humbly trust enjoyed, for thirty-five years.

Item Second: I desire and direct all my just debts be paid without delay by my executors hereinafter named, as I am unwilling my creditors should be delayed of their rights, especially as there is no necessity for delay.

Item Third: I give and devise to my beloved wife Margaret (with whom I have lived in the strictest quiet and love, for thirty years,) my houses, furniture and gardens and yard, situated on lots No. 7 and 14, in the eighth district of Dooly, now Pulaski county, during her natural life or widowhood. If she shall marry, I desire that there be a division of the above named property equal, and my wife have a child's part.

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Item Fourth: I desire that the balance of my p'perty shall remain together until my youngest child comes of age; each one to be clothed and educated out of my estate equal with my other children, and my estate to pay them one thousand dollars as they come of age, and when my youngest child comes of age, I wish an equal division of the balance of my property. My son Henry has received \$1285; my son-in-law, Martin B. Everett has had of my estate to the amount of \$809; my son Robert has received \$130; and I devise to him five negroes, viz: Agnes a woman, and her four children, Isaac, Susan, Tom, and Patience; these negroes I estimate at \$1,400, which I allow to him at, as his first payment in my estate. I desire that all that Henry and Robert has received over one thousand, shall stand against them till there be a general division of my estate. I will that my son-in-law, Martin B. Everett, be paid \$191 to make up his first payment.

Item Fifth: I constitute and appoint my beloved wife Margaret, executrix, and my son-in-law Martin B. Everett and son Reuben Harrell, executors, to this my last will and testament. This June 29th, 1846.

MILES HARRELL, L. S.

Signed, sealed and delivered as his last will and testament, in the presence of us subscribing witnesses, who subscribed our names hereto, in the presence of said testator and of each other, this June 29th, 1846.

CATHARINE MATHEWS,
DANIEL McLEOD,
ISAAC D. JOHNSON.

The bill alleges, that Miles Harrell, the testator, died in the year 1846, after making said will, leaving his widow, and eight children, to-wit: Henry, Robert, Reuben, Sarah the wife of Martin B. Everett, William, Miles, James and Margaret Elizabeth. That testator left a considerable estate, real and personal, consisting of lands, negroes, stock on his plan-

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tation, &c. That Martin B. Everett and Reuben Harrell, two of the executors, therein named, qualified and took possession of the whole estate, and have employed the negroes on said plantation ever since, and realized large sums from the proceeds of the crops, &c.

The bill further alleges, that at the time of the death of said testator in 1846, Margaret Elizabeth, one of his children, was a minor; that on the 23d day of December, 1852, complainant intermarried with said Margaret, and on the 26th January, 1853, she departed this life intestate, without issue, and under the age of twenty-one years, and that complainant has taken out letters of administration on her estate; that all that was ever received by his wife or himself from the estate of her father, was about four hundred dollars, paid to him in the life time of his wife, by the executors, and that the youngest child of testator, to-wit, James Harrell, has attained the age of twenty-one years, and that complainant now as the administrator and representative of his wife and in her right, is entitled to an account from the executors, and to receive from them the legacy or interest of said Margaret Elizabeth in the estate of her father under his said will, and which share or interest, the complainant maintains, is the one-ninth part of said estate; that he has applied to the executors for an account and settlement, but they refuse so do, and deny complainant's right to any portion of said estate.

The defendants demurred to this bill, on the grounds:

1st. That the intestate of complainant died under the age of twenty-one years, and therefore no title to any of the estate of Miles Harrell, ever vested in her under any clause of said will.

2d. Because the estate of Miles Harrell the testator, consisted of real and personal property, and complainants intestate having died before the time for the division of said estate, it lapsed and never vested.

3d. Because, if the estate ever vested in complainant's in-

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testate, he cannot recover it before the time at which she would have been twenty-one years old, if she had lived.

As there was nothing on the face of the bill to support the third ground of demurrer, it was abandoned on the argument.

The Court overruled the demurrer, and ordered defendants to answer; and counsel for defendants excepted.

F. SCARBOROUGH, for plaintiffs in error.

KILLEN; and I. L. HARRIS, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

Whether the legacy vested in all the children at the death of the testator, depends upon the object and intention of the testator. As remarked by a learned lord Chancellor of England; "upon such a question no one can be quite sure, that any decision is right." We must determine by the best guides we have.

In the beginning of the will, the testator declares it to be right and proper, both as it respects himself and family, that he should make a division of his property. He makes a special bequest to his wife. He directs the balance of his property to be kept together until his youngest child becomes of age. He explains his object. It is not for the purpose of accumulation; but it is for the benefit of those of his children who have not attained majority. That is his exclusive reason for directing the property to remain together. Each of his children was to be clothed and educated to equalize them with his elder children, who had been clothed and educated. As they became of age, they were to have a thousand dollars. The only object of the testator in making a will seems to have been to provide for his wife a comfortable home during her life, and to give the same advantages to his younger children, that his older children had enjoyed. In all other respects, the will makes just such a distribution of

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his property as the law would have made. There is nothing in the whole plan of the will which manifests an intention that the property should not vest. It would seem to be inconsistent with principle to hold that the property did not vest in those for whose exclusive use it was to be kept together, and for which reason alone the division was postponed until the youngest child became of age. He directed his estate to pay them one thousand dollars as they became of age. When his youngest child became of age, he wished an equal division to be made of his property. There is no condition annexed to the bequest. No word is used indicative of an intention, on the part of the testator, that the property should not vest at his death in all his legatees.

In the Circuit Court of the United States, for the third Circuit, a somewhat similar case was decided. *Reading vs. Blackwell*, *Baldwin's Reports* 166. The testator directed his real estate in New York, to be sold when J. H. W. should attain, or in case of his death, might have attained, the age of twenty-one years. He directed one half of the proceeds of the sale to be carried to the residuary part of his estate. This residue he gave to certain legatees, three of whom died before J. H. W. attained the age of twenty-one years; before, therefore, the land in the city of New-York could be sold, and of course, before one half of the proceeds could be carried to the residue of the estate. It was held that the legacies vested at the testator's death, and that the personal representatives of the deceased legatees were entitled to them.

It is insisted in this case, that there was no gift of the legacy prior to the period appointed for its payment, and that complainant's wife having died before that time, the legacy did not vest in her. The intermediate interest of the entire residue of the estate is directed to be applied to the clothing and education of those of the testator's children, who had not attained the age of twenty-one years, and among them was included the complainant's deceased wife. This circum-

state had the effect, *prima facie*, of vesting the legacy. 1. *Roper on Leg.* 387—8.

Other circumstances prove that the testator intended the legacy to vest on his death. His only objection, as is manifestly collectible from his will, to the immediate distribution of his estate, was that the younger children might be clothed and educated before the division. It was a gift to them for that purpose up to the time mentioned in the will. But if the youngest child had died, under age, and the others were at that time of full age, the estate would have been immediately distributable, because the reason which operated on the testator would no longer have existed.

This is a contest amongst the children of the testator, all of whom are legatees under the will. There is no expression in the will, which shows an intention on the part of the testator to give a preference to one of his children over another; on the contrary, his main object seems to have been to equalize their interest in his estate under his will. His elder children had been clothed and educated by him until they arrived at age. This is to be presumed. If an immediate distribution had been ordered, they would have had, to that extent, a greater interest in the estate than the younger children.

The testator had given off to such of his children as had arrived at age, property or money, but not an equal amount to each. He provides for a division, on terms of perfect equality, at the final distribution of his estate. He had given one of his sons something more than one thousand dollars. The excess he directed to be charged against him at the final distribution. He had given his son-in-law, less than a thousand dollars. He bequeaths to him a sum of money to make up that amount. He had given another son an inconsiderable sum. He bequeaths to him a few negroes, and fixes a value on them, and directs that at the general division he should account for all over one thousand dollars. He directs

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that each of his younger children as they respectively become of age, shall be paid one thousand dollars.

When his youngest child comes of age, he wishes an equal division made of the balance of his property. But amongst whom is this division to be made? The testator does not say. If there was no bequest until the period fixed for the division, there is certainly no express bequest to any one at that time.

We think it evident from the whole plan of the will, that the testator intended that his estate, except what he had bequeathed specifically to his wife, should vest in his children, and perhaps his wife, at the time of his death, and that he only fixed the period at which the distribution should be made.

Judgment affirmed.

No. 10.—JETHRO ARLINE, Ex'or, plaintiff in error, vs. SARAH MILLER, defendant in error.

- [1.] On the death of an administrator, liable and chargeable to the estate of his intestate, his executor is chargeable and liable in the same manner that he would have been, if he had not died.
- [2.] The executor of a deceased administrator who has wasted his intestate's estate, may be proceeded against in the same manner that his testator might have been, if he had not died.
- [3.] When the right survives to the wife, the representatives of her deceased husband need not be made parties to her suit to recover her choses in action, and when all the heirs of the estate in which she sues for her interest, are made known in the proceedings, they need not be made parties.
- [4.] If improper evidence is admitted to the jury without objection, it is too late after trial, to take advantage of it.
- [5.] The executor of an administrator, cannot be charged as the representative of the intestate's estate of which testator was administrator, but he can be charged for the *destruere* of his testator in the same manner that testator might have been charged, if he had been living.

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- [6.] When the right of action does not accrue in regard to the wife's right until after coverture, it is not error for the Court to charge the jury, that if the complainant was a minor and married when she was a minor, she is protected from the bar of the statute, if she sue within three years, &c.
- [7.] An answer to a bill from information, hearsay or belief, (except perhaps, when the facts answered by a defendant *against his interest*, are from information, and he states, additionally, that he believes them to be true,) are not responsive to a bill so as to make them evidence in the case.
- [8.] Disposition of trust property by will, by a testator who was trustee, is a conversion of the property, but it may be followed by *cestui que trust* into the hands of the executor.

In Equity, in Laurens Superior Court. Tried before Judge Love, October Term, 1856.

This bill was filed by Sarah Miller, against Jethro Arline, executor of Enoch Tootle, deceased.

The bill alleges that about the year 1806, one Gracy Taylor, then of the State of North Carolina, had a life estate in a negro man, Abram, remainder to her children, William Tootle and his two sisters: That about that time William being about to remove to the State of Georgia, and owning the wife of Abram, purchased of his two sisters their remainder, and also the life estate of Mrs. Taylor, agreeing to pay her therefor, the sum of \$60 per annum during her life: he brought Abram with him to Georgia. In 1814, William Tootle died in Washington county, leaving a considerable estate, and as his heirs at law, his widow Fereby, and four children, to-wit: Hannah, Penelope, Mary, and Enoch Tootle, and complainant—the only child of a deceased daughter—Winefred: That amongst the estate left by said William, was the negro Abram and one hundred and ninety acres of land, in the county of Washington, which land was assigned to said Fereby his widow, as her dower, and which she occupied until her death, about the year 1826. That Enoch Tootle and Thomas Glenn were appointed administrators of William Tootle's estate, 4th July 1814, and took possession of the same, including Abram; and said Enoch as administrator continued to hold possession of Abram using him for

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his own profit and advantage, until his, Enoch's death in 1849. That he never set up or pretended to have any title to Abram, until the 10th of May, 1848, when by his will of that date, he converted him, by bequeathing him to the children of Hannah Price. That after the death of Fereby, the widow, the said Enoch took possession of the one hundred and ninety acres of land assigned to her as dower, and held and occupied the same until his death in 1849, and that said negro Abram and said one hundred and ninety acres of land, although part of the estate of William Tootle, has never been distributed amongst his heirs; but the same together with the hire, labor, rents and profits, have been appropriated by said Enoch, as administrator, till his decease, and by Jethro Arline his executor since. That the estate of William Tootle was perfectly solvent, but no annual returns were made by the administrators, as required by law. That Jethro Arline, the defendant, qualified as executor of Enoch Tootle, 3d September, 1849, and took possession of the whole estate of his testator, including Abram and his hire, and the one hundred and ninety acres of land, and its rents, and which were so mixed up with the individual estate of his testator as to make it impossible to separate and distinguish them. That Glenn departed this life long before Enoch Tootle, leaving said negro and his hire, and said land and its rents in the hands of his co-administrator, and which or the value of which, said Arline as his executor ought now to account for and pay over to the heirs at law of William Tootle, but which he refuses to do.

Mary Tootle, one of the daughters of William, married Thomas Glenn. Winefred married Reuben Underwood, (by whom she had but one child, the complainant,) and she died before her father, William Tootle, leaving complainant to inherit her portion of her grand father's estate. That at the time of her mother's death, about 1812, complainant was in extreme infancy; that when about eighteen years old, she married Gideon Miller, who died the 10th June, 1849, with-

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out having received or reduced into possession complainant's share of her grand-father's estate in the hands of Enoch Tootle, administrator, and the right to receive the same, has survived to her.

The bill prays for an account, and that one-fifth of the value of Abram and the one hundred and ninety acres of land, and the one-fifth of the hire, rents and profits thereof, be paid to complainant.

Jethro Arline, executor of Enoch Tootle, filed his answer to the bill; he ignores all about Gracy Taylor's title to Abram, and remainder to her children; also as to the birth, residence and removal to Georgia of William Tootle. Knows nothing about Abram until 1848, when he was very old and worthless. All he knows about William Tootle's estate, he derives from the appraisement returned by the administrators, (Ex. A.) and Abram is not returned therein, as of the estate of William Tootle, and prays that complainant be held to strict proof of this fact. Knows nothing about the value of the one hundred and ninety acres of land, nor of its having been assigned to the widow of William Tootle as dower; nor of her being put in possession thereof; nor the time she died, but believes it was between the years 1829 and 1833. Admits that his testator and Glenn were the administrators of William Tootle and took charge and possession of his estate, but does not admit that Abram was part of that estate, and as far as he knows, Enoch always claimed said negro as his own individual property, and disposed of him as such, by his last will and testament: when Enoch died in 1849, Abram was then in his possession; cannot say what his annual hire from 1814 to 1849, would be worth, as he never saw him before 1848; since that time not worth more than \$15 per annum. That prior to the death of said *Fereby*, he has been informed and believes that his testator was in possession of said one hundred and ninety acres of land, claiming and exercising ownership over it as his own, adversely to said *Fereby*, and to the other heirs of William Tootle, and that

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said land and Abram have come to his hands as his executor; that his testator owned a settlement of land worth \$5 per acre, but has no knowledge of the one hundred and ninety acres mentioned in the bill, as separate from the body of the tract, and cannot identify it. Admits that his testator disposed, by his will, of said land and negro, as charged in the bill; and does not believe that at his death he had any of the estate of William Tootle in his hands unaccounted for; pleads lapse of time and the statute of limitations; admits that complainant is the grand daughter of William Tootle and entitled to *one-sixth* of his estate; that she married Miller, who died in 1849, but denies that he died without reducing said share of his wife's interest in her grand-father's estate into his possession; that he died indebted to Enoch Tootle the sum of fifty dollars on two Justices Court *fi. fas.*, dated 29th March, 1839, and that he held against Miller demands besides, amounting to several hundred dollars, and thinks these debts would not have existed, if Miller had not before received his wife's share of said estate; avers that from everything that has come to his knowledge he believes that Gideon Miller the husband of complainant received all her share in William Tootle's estate.

By way of *demurrer*, that there is no privity between the executor of Enoch Tootle and the heirs at law of William Tootle, who must assert their rights through an administrator *de bonis non*, on William Tootle's estate. That in 1817, Reuben Underwood the husband of said Winefred and father of complainant, received of the administrators of William Tootle, \$780 69 in full of complainant's share in said estate, and the same was paid to him as guardian of said Sarah; and refers to a receipt for the same in defendant's possession, and which he believes to be genuine.

Testimony:

Complainant proved by *Thomas Wright*, that William Tootle had eight children, Winefred, Elizabeth, Fereby, Mary,

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Enoch, Hannah, Gracy, and Penelope; that Elizabeth died before her father; that complainant was the daughter of Winefred; that Winefred died in 1809. Sarah Miller, complainant, was born in 1809, and was married to Gideon Miller in 1824, who died 10th June, 1849; that he knew Abram; was in William Tootle's possession at the time of his death, and Tootle told witness that he belonged to his mother until she died, and then he was his property; that he had to pay his mother sixty dollars for him per year, as long as she lived. William Tootle died in 1814; Enoch Tootle and Thomas Glenn administered on his estate and Abram was not carried into the estate or division. Glenn told witness, after that, he was paying William Tootle's mother sixty dollars a year for him, as administrator of William Tootle; Abram is worthless at this time from old age; hire has been worth \$60 per annum for the last twenty-five years, and was in Enoch Tootle's possession from 1814, till his death in 1849. In 1814, witness carried the chain to set apart a dower for Fereby Tootle, out of the lands belonging to William Tootle's estate. The land assigned, contained one hundred and seventy or one hundred and eighty acres. Fereby died in 1833, and Enoch Tootle held the said land from her death till he died in 1849. Since that time, the land has been occupied by Hannah Price, but controlled by Jethro Arline; land worth ten dollars per acre, and the annual rent one hundred dollars from 1833 to 1854.

Crawford Webb, proved, that Enoch Tootle requested him to go to Gideon Miller, (Isaac G. Miller) and buy his interest in the dower land of Fereby Tootle, about one or two months before Miller's death; the land was first rate pine land. After the widow's death, Miller claimed of Enoch Tootle his portion of said land, but Tootle refused to settle with him unless he would take twelve dollars for his share. Enoch told witness he did not know to whom *Abram* belonged; that he belonged to his mother before she died, but

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as the thing stood, he did not know who he belonged to, and did not intend to account to any of the heirs for him.

W. B. Calleys, proved (by interrogatories) that he saw an elderly lady in North Carolina, called Taylor—did not know her given name; she died in February 1826, in Duplin county, N. C. Does not know if Mr. Tootle is her son.

John Cochran—Valued the dower land of Fereby Tootle at \$10 per acre, and would rent for \$1 50 per acre; knows Abram; saw him in Enoch Tootle's possession, and considered him his property; was worth at first, sixty-five dollars a year; thereafter a few years, fifty dollars; not worth anything at Enoch Tootle's death. Enoch said he came into his possession from his father's estate.

Matthew Smith, proved, that he knew Gracy Tootle, daughter of William Tootle; she married Jack Bryan, and died about thirty years ago, without heirs; she died after William Tootle.

The plaintiff having closed, defendant's counsel moved to dismiss the bill:

1st. For want of privity between the executor of Enoch Tootle, and the administrator of William Tootle.

2d. For want of Equity.

3d. For want of proper parties.

Which motion the Court overruled and defendant excepted.

The defendant introduced no evidence. The Court charged the jury amongst other things, that if complainant was a minor and married during her minority, she was protected from the bar of the statute of limitations, and if she sues within three years, it is a reasonable time, and her bill is not affected by the statute. Whenever a fact stated in an answer, is not responsive to the bill, it is the duty of the defendant to prove it, and the statement in the defendant's answer, that Underwood as guardian, had received complainant's share of William Tootle's estate in full, is a fact not

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responsive to the bill, and must be proved, and is not evidence unless so proved. That the disposition by will of property is a conversion. That the jury in computing the time within which a bill may be brought, may allow the twelve months from the time of issuing letters testamentary to Jethro Arline, executor.

To all of which charges defendant excepted.

The jury found for complainant fifteen hundred and fifty dollars, as her distributive share of the estate of William Tootle.

Whereupon, defendant excepts, and tenders his bill of exceptions, and assigns the rulings and charges before excepted to as error.

W. S. ROCKWELL, for plaintiff in error.

WARREN, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

Sarah Miller filed her bill against Jethro Arline, as executor of the will of Enoch Tootle, deceased, requiring the sale of a negro man named Abram, and one hundred and ninety acres of land, alleged to have been assigned as dower to the widow of William Tootle, deceased, on whose estate the said Enoch Tootle had administered, and *for other relief*. Gracy Taylor, the mother of William Tootle, had a life estate in Abram, and he and his two sisters were entitled to the remainder. William Tootle purchased the interest of his sisters in the remainder, and the life estate of his mother in Abram. He agreed to pay for the interest of the latter, sixty dollars per annum, during her life. These things took place about the year eighteen hundred and six. William Tootle died in eighteen hundred and fourteen. Gracy Taylor died in eighteen hundred and twenty-nine. Fereby Tootle, the widow of William Tootle, died in eighteen hundred and twenty-six. Enoch Tootle and Thomas Glenn administered

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on the estate of William Tootle, deceased. Abram was appraised as belonging to the estate of William Tootle, subject to the life estate of Gracy Tootle; Enoch Tootle as administrator, took possession of Abram after the death of William Tootle, and appropriated his hire to his own use, without ever setting up title to him, until 1848. He died in 1849. Complainant did not know until two years after Enoch Tootle's death, that he set up any claim or title to Abram, while he was in life.

The dower land was not sold by the administrators after the death of Fereby Tootle, the widow, but Enoch Tootle took possession thereof, and appropriated the rents and proceeds thereof to his own use, to the time of his death. He claimed the land in no other right than as administrator of William Tootle, until he devised it in his will. His will was probated in 1849. Jethro Arline, as executor, proved the will of Enoch Tootle, took possession of Abram and his hire, and the land assigned as dower and owned by William Tootle at the time of his death, together with the rents. Thomas Glenn is dead, having left the land and negro, the rents and hire in the hands of Enoch Tootle. When William Tootle died, he left a wife, three children, Enoch, Hannah and Penelope, and complainant, the daughter of his deceased daughter Winefred, as his heirs at law. There were no creditors; each of the heirs at law of William Tootle, it is alleged is entitled to five thousand dollars, or other large sum from the rents and hire, and the land and negro should be turned over to them as the heirs at law of William Tootle, deceased. Complainant was an infant at the death of her grand father, and so continued until she married, and she remained under coverture until June 1849, when her husband departed this life, without having reduced the property to possession; other heirs at law declined to become parties to this bill.

The counsel for the defendant moved in the Court below, to dismiss complainant's bill, on the ground, that there is no privity between the executor of Enoch Tootle and the admin-

istrator of William Tootle, deceased, and for the want of Equity and proper parties.

The Court refused the motion, and defendant's counsel excepted.

[1.] The defendant is executor of the last will of Enoch Tootle, deceased. Enoch Tootle, when in life and down to the time of his death, was administrator on the estate of William Tootle, deceased. The complainant is one of the heirs at law of William Tootle deceased. According to the allegations of the bill, Enoch Tootle had never accounted for the hire of Abram, nor for the rent of the land which had been assigned for dower to William Tootle's widow, which he is charged to have taken possession of, after her death. He is charged to have appropriated the hire and rents to his own use. The executor of an administrator who wastes or converts goods, chattels, estates or assets of any person deceased to his own use, is liable and chargeable in the same manner as the testator would have been, if he had been living. *Cobb's new Dig.* 309-10. Under the charges of this bill, the testator Enoch Tootle would have been liable to the complainant, not only for the hire and rents, but for the property, for he is charged to have converted the whole of the property to his own use.

[2.] But for the statute above referred to, and the Act of 1799, *Cobb's new Dig.* 288, the complainant would have been but a simple contract creditor of Enoch Tootle, who had, as administrator of William Tootle, committed a devastavit. *Charlton vs. Low, Peere Wms.* 330. These statutes enable the complainant to call the executor to account in the same manner that she might have proceeded against his testator, and secure to her a preference over other creditors. The former of these acts gives the remedy against the executors and administrators of a deceased administrator, as well as against the executors and administrators of an executor, *de son tort*.

[3.] There are sufficient parties to the bill. The complain-

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ant sets forth fully her title to an account, how it arose, that she is entitled as an heir at law of her deceased grand-father; her mother, who was his daughter, and if living at his death, would have been one of the heirs at law, having been dead at that time—she sets forth the number of heirs at law amongst whom the estate was distributable, (but if she mistakes in this, and it appears in the proceedings, it is sufficient;) that her husband is dead, that he never reduced the part of the estate sued for to possession, and that she is now entitled to an account for it. It is a right that survived to the wife. *Calvert on Equity*, 271.

There is, unquestionably, equity in the bill. The executor of Enoch Tootle is liable and chargeable in the same manner that he would have been if he had been living, and this is an ordinary bill for an account.

[4.] The record does not show that there was any objection to the sayings of Enoch Tootle as evidence, urged at the hearing of the cause.

[5.] The executor of Enoch Tootle cannot be charged as a representative of William Tootle, deceased. He is proceeded against as the representative of Enoch Tootle, who was liable and chargeable as the administrator of William Tootle, as well as for the distribution of the undistributed part of William Tootle's estate. For the latter purpose, the bill could not be sustained; but the bill makes a case of mal-administration on the part of Enoch Tootle, and a conversion to his own use of both the hire of the negro and the rent of the land, and also of the negro and the land, for which a decree might be made against him under the prayer for general relief. The decree would be *de bonis propriis*.

[6.] The objection to the charge, which the Court gave the jury on the statute of limitations, is that one disability cannot be tacked to another to prevent the bar of the statute, and that the coverture of the complainant during her infancy cannot be tacked to the infancy to prevent the bar. The statute of limitations does not usually run against a trust. Pre-

sumption of payment sometimes arises from length of time. But that presumption is often repelled by the circumstances of the case, in which it is attempted to raise it. Are the circumstances of this case so strong against it as to counteract its force? The testator administered in 1814, and continued administrator of William Tootle's estate until he died in 1849. It is not insisted that he was ever dismissed from the administration; the right of complainant to have an account for either the negro or his hire, the dower land or its rent, did not accrue until the death of Gracy Taylor and Fereby Tootle, both of whom died after she had attained the age of twenty-one years, and during her coverture; one of the witnesses testified that on the death of William Tootle, Abram was not carried into the division of his estate. By another witness, it was proven that within a very short time prior to Enoch Tootle's death, he proposed to buy of Miller his interest in the dower land. From these circumstances, it is clear that the presumption of payment could not arise in the case, and that there was no statute bar to complainant's right, whether she was a minor and married when she was a minor, or not.

[7.] The receipt given by complainant's deceased father to the administrators, is not exhibited in the record. We do not know its precise terms, but from the copied evidence in the case, we infer that it did not embrace the subject matter contested in this suit, for it was given long anterior to the accrual of the right to demand either Abram or the land assigned for the dower of Mrs. Tootle or the hire or rent. The charge of the Court in reference to the receipt, is that that statement in the answer is not evidence without proof—that it is not responsive to the bill. The defendant's answer states, that he found the receipt amongst the papers of his testator, that he believes it to be the genuine signature and receipt of Underwood, the father of the complainant, but he does not say that he knew the hand-writing of Underwood. He then claims that the receipt came from the proper custody and

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from its antiquity proves itself. This is the answer in regard to the receipt. There is no allegation in the bill respecting the receipt to which the answer in regard to it can be responsive. *Gresley's Eq. Evidence* 304, 430. The answer of a defendant to charges in the bill, must be direct and positive, and not from information, hearsay and belief, to entitle it to a claim to be responsive to the bill and make it evidence, except perhaps, where the facts answered by a defendant *against his interest*, are from information, and he states, additionally, that he believes them to be true. This defendant knows nothing of a payment except from the receipt, and a receipt too, for ought that appears in the record, of a person, to whom the executors had no authority to pay. The defendant answers to the payment as an inference from the receipt, and withholds the receipt that he acknowledges to be in his possession, and claims that his answer to a matter of which he knows nothing, shall be regarded as responsive to complainant's allegations, and defeat her right of recovery. We think there was no error in the charge of the Court on that point.

[8.] The testator treated the property as his own by disposing of it by his will, and claimed it, in hostility to the true owners, as whose trustee he held it, and that was a conversion of it. The complainant could follow it into the hands of his executor and claim an account of it.

Without going into a minute examination of the evidence, we will barely say that there was evidence sufficient to sustain the finding of the jury, and the law fully supports it.

Judgment affirmed.

No. 11.—JONAS H. HOLLAND, plaintiff in error, vs. JEPHTHA J. CHAFFIN and LEWIS L. LANE, defendants in error.

Since the Act of February 20th, 1854, (Acts of 1855-6,) a partial payment of a debt, or a verbal acknowledgment of a debt, is not sufficient to countervail the effect of the statute of limitations on the debt.

Debt from Jasper Superior Court. Tried before Judge HARDEMAN, at April Term, 1857.

Holland brought suit against Chaffin as principal, and Lane as security, on a promissory note for \$126 30, dated 16th April, 1849, and payable one day after date.

There was a credit on the note of one dollar, paid by Chaffin, 10th February, 1855, and the declaration was amended, alleging this fact, and that by reason thereof, defendant's liability continued.

Lane the security, pleaded several pleas, but relied mainly on the plea of the statute of limitations.

Upon the first trial, there was a verdict for plaintiff for the amount of the note. Lane entered an appeal.

Upon the appeal trial, plaintiff offered the note in evidence, which was objected to by defendant; the Court sustained the objection, and plaintiff excepted.

Plaintiff then proposed to prove by a witness, that Chaffin had admitted to him that the note had been presented for payment before the lapse of six years from the time of its maturity, and after the credit had been endorsed, and that he then admitted indebtedness on the note, and that the credit was made in good faith and with his assent, to prevent the bar or operation of the statute of limitations. Plaintiff admitted however, that Lane the security was not present, and knew nothing about it.

Defendant objected to the introduction of this testimony; the objection was sustained by the Court, and the testimony excluded.

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The jury found for the defendant, and plaintiff's counsel excepts.

W. W. ANDERSON, for plaintiff in error.

BARTLETT, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

Does the partial payment of a debt by the debtor, or the verbal acknowledgment of the debt by the debtor, destroy the effect of the statute of limitations upon the debt? The decision of the Court below was that neither does.

The question turns upon what is the meaning of the Act of 20th February 1854, amendatory of the statutes of limitations. That Act is as follows:

“From and after the passage of this Act, no promise, acknowledgment, or admission, of a debt, made after the statute of limitations has commenced running, shall be sufficient to revive the same, unless such promise, acknowledgment or admission, shall be reduced to writing, or some note or memorandum thereof, made in writing, and subscribed by the person or persons making the same, or some other person thereunto by him lawfully authorized: *Provided*, this Act shall only operate upon and affect, such promises, acknowledgments, and admissions, as shall be made after its passage.”
Acts of 1855-6. 238.

Every partial payment of a debt, implies an admission of the debt, and a promise to pay the balance of the debt. By the old law, any admission of a debt, or any promise to pay a debt, neutralized the effect of the statute of limitations on the debt. Hence it was, that by the old law a partial payment of a debt neutralized the effect of the statute of limitations on the debt.

By the new law, (the Act aforesaid,) no promise, acknowledgment or admission of a debt, unless made in writing, can neutralize the effect of the statute on the debt. By the new

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law, therefore, the admission of a debt, and the promise to pay it implied in a partial payment of the debt, cannot neutralize the effect of the statute upon the debt.

And the new law, saying as it does, that no promise, acknowledgment or admission of a debt, unless made in writing, shall be sufficient to neutralize the effect of the statute upon the debt, says unequivocally, that no *express* promise or admission of the debt, shall have this effect.

In the present case, there was the admission and the promise to be implied from a partial payment of the debt, and there was an express verbal admission of the debt.

But according to the new law, such an admission or promise as these, could not neutralize the effect of the statute on the debt, because they were not in writing.

We think therefore, that the Court below was right.

Judgment affirmed.

No. 12.—JOHN W. H. MITCHELL, administrator *de bonis non*, &c., plaintiff in error, vs. JOHN B. LACY, defendant in error.

If the answer to a bill for mere *discovery*, be read to the jury by the defendant in that bill, against the consent of the plaintiff in the bill; and the case goes against the plaintiff in the bill, a new trial ought to be granted.

In Equity, from Thomas Superior Court. Tried before Judge LOVE, December Term, 1856.

John B. Lacy filed his bill against Enea McLane, executor of the last will and testament of Thomas J. Johnson, deceased, which McLane answered, and filed a cross bill, which

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Lacy answered. The cross bill was for discovery only, and sought no relief.

McLane dying, Mitchell became administrator, *de bonis non*, with the will annexed, of Johnson.

At December Term, 1856, the case came on for trial. The original bill, with the amendments, was read, and the answer thereto; complainant's counsel then called for the reading of the cross bill, and the answer thereto. Counsel for defendant Mitchell objected, claiming that the cross bill and answer thereto was the defence and evidence of defendant, and that the same should not be heard until complainant had introduced his testimony: The Court allowed the answer to the cross bill to be read, as part of the pleading, it having been agreed upon by the parties, that the bills were to be tried together. To which decision counsel for defendant excepted.

The testimony on both sides having been submitted, the jury under the charge, found for the plaintiff, and counsel for defendant moved for a new trial, principally on the ground above excepted to.

The Court overruled the motion, and refused a new trial, and counsel for defendant excepted and assigns error.

ROCKWELL and COLE, for plaintiff in error.

SEWARD & HANSELL, represented by IVERSON L. HARRIS, for defendant in error.

By the Court.—BENNING J. delivering the opinion.

The answer to a bill for discovery cannot be used by defendant in the bill, as a matter of *evidence* for himself; a person cannot make his own sayings evidence for himself.

Neither can the answer to such a bill, be used by either party before the jury, as a matter of *pleading*; such a bill presents to a jury nothing for trial: no issue is, or can be, made on it; no decree, rendered on it.

Mitchell, adm'r vs. Lacy.

In the present case, the defendant read to the jury his own answer to the cross bill. This he had no right to do, if the above propositions are true.

But it is insisted, that he had the *consent* of the defendant, to the act of reading the answer to the jury.

This consent, however, had been withdrawn before the reading was begun. The plaintiff in the cross bill, before the answer to that bill was read by the defendant to that bill, *objected* to its being read. And the consent was such a one as might be withdrawn at any time. It was not a consent that the answer of the defendant might be read by him, as *evidence*, but as *pleading*; and the reading of it to the jury as pleading, would have been *useless*. Any consent that cannot be of use to the person to whom it is given, may be withdrawn at any time; for in such a case, the withdrawal of the consent cannot hurt him.

The defendant then did not, from consent, acquire the right to read his answer to the jury.

It follows that he had no right to read it to the jury.

Did his reading of it to the jury, do the other party any harm? It is impossible to say that it did not. True, it seems that he read it as a part of the pleading; but then it was wholly useless as a part of the pleading; and, being before the jury, it might have been treated by them as a part of the *evidence*. That was the only use to which they could put it. It does not appear that they were charged by the Court to disregard it as evidence.

It is therefore the part of safety, to let the case be passed upon by a jury that has not seen this answer. The defendant in the bill has no right to complain. He would read *the* answer, regardless of the objection of the plaintiff.

There ought to be a new trial.

Judgment reversed

Johnston vs. Crawley.

No. 13.—DAVID S. JOHNSTON, plaintiff in error, vs. ROBERT CRAWLEY, defendant in error.

[1.] In a claim case, growing out of the levy of a mortgage *fi. fa.*, the proof was, that the claimant was in possession at the levy, but that such possession was by virtue of a title which he obtained by purchasing the property at Sheriff's sale, when it was sold to satisfy general judgments against the defendant *fi. fa.* younger than the mortgage.

Held, That such proof was sufficient to prevent a non-suit.

[2.] A. had a mortgage on property of B. The mortgage was foreclosed, and the *fi. fa.* levied on the property. C. and others had general judgments against B., younger than the mortgage. The property was sold under these general judgments, before it was levied on under the mortgage *fi. fa.*, and D. became the purchaser. D. put in a claim against the levy made under the mortgage *fi. fa.* and sought on the trial to attack the mortgage.

Held, That the judgment of foreclosure of the mortgage, did not bar him from such attack.

Claim, from Morgan Superior Court. Tried before Judge HARDEMAN, at March Term, 1857.

At March Term, 1856, of the Superior Court of Morgan county, Robert Crawley foreclosed a mortgage which he held upon the Madison Steam Mills. This mortgage was dated *twenty-fifth April, eighteen hundred and fifty-five*, and the judgment of foreclosure was entered *sixth of March, eighteen hundred and fifty-six*. On the *fifteenth of March, eighteen hundred and fifty-six, fi. fa.* on said judgment was issued, and levied, by the Sheriff of said county, upon the property, on the *twenty-fourth of April*, in the same year, when David S. Johnston interposed his claim to the premises levied on. The claim was subsequently dismissed; the property again levied upon by virtue of the mortgage *fi. fa.* issued in favor of Crawley, and was again claimed by Johnston.

Issue was tendered by plaintiff and joined by claimant, and the parties went to trial.

Plaintiff introduced the *fi. fa.* with the returns thereon; proved the levy, and that defendant in said *fi. fa.*, the Madison Steam Mill Company, was in possession of the property

at the date of the execution of the mortgage, and was subsequently in possession; also proved that the Sheriff had afterwards levied certain general *fi. fas.* on said property, the *fi. fas.* being founded on judgments younger than the mortgage; that claimant had purchased it at Sheriff sale under those *fi. fas.*, and had been put into possession thereof, and was in possession at the time of the levy under the mortgage *fi. fa.*; that notice of mortgages amounting to near twenty thousand dollars, among which was the one to Crawley, had been given at the time of said sale, and that the purchaser would buy subject to those mortgages: the value of the property at the time of the sale, was estimated at twenty or twenty-one thousand dollars, and at the time of the trial, at twelve or eighteen thousand dollars.

The plaintiff having closed, counsel for claimant, moved for a non-suit, on the ground, that the plaintiff had not proven title to the property, nor made out such a *prima facie* case, by proving possession of defendant at the time of levy, as would shift the burden to claimant.

The Court refused the motion to non-suit, holding that plaintiff having proved the possession of defendant at the time the mortgage was executed, and subsequently thereto, cast the burden on claimant. And this is the first ground of error assigned by claimant.

Claimant then tendered in evidence, which was admitted, the Sheriff's deed to him of the premises sold under the general judgments against the defendant—deed dated 4th March, 1856.

He then proposed to introduce the instrument, purporting to be a mortgage from the Madison Steam Mill Company to Crawley, signed by Elijah G. Jones, President, and A. G. Foster, Secretary, but without the corporation seal; and also the books of minutes kept by said company; counsel stating that his purpose was to show by this testimony, that the instrument purporting to be a mortgage, deed from defendant to,

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Crawley, was not executed in the manner in which only corporations can execute deeds conveying land, viz: by the corporation seal: and that Jones and Foster had no authority to sign and execute said deed.

Plaintiff objected to the introduction of this testimony, on the ground that it was proposed thereby, to attack and impeach collaterally the judgment of this Court in the proceedings of foreclosure of said mortgage. The Court sustained the objection and repelled the testimony, holding, that the judgment of foreclosure, was a judgment declaring said instrument a *mortgage*, and claimant was thereby precluded and barred from showing it otherwise in this proceeding.

To which decision and ruling, claimant by his counsel excepted.

STARNES, for plaintiff in error.

CONE, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Ought the motion for a non-suit to have been granted?

Did the evidence show that the defendant in *fi. fa.* had the *title* at the date of the mortgage? or, that he had the *possession* at the date of the levy? or, that any one claiming under him by title passing from him after the date of the mortgage, had the possession at the date of the levy? If the evidence showed any one of these things, it is indisputable that the non-suit ought not to have been granted.

The evidence showed the last, if not the first of these things. The evidence showed this—that the defendant in *fi. fa.*, being in possession of the property, mortgaged it to the plaintiff in *fi. fa.*; that afterwards, certain general judgments were rendered against the defendant in *fi. fa.*, and, that, under *fi. fas.* issued from those judgments, the property, whilst still in the possession of the defendant in *fi. fa.*, was seized

and sold, that the claimant became the purchaser of it, and, as such purchaser, took possession of it, and that whilst he was in possession of the property, under this purchase, it was levied on by the mortgage *fi. fa.*

Although, therefore, it was the claimant that was in possession at the date of the levy, yet it is manifest, that he must have been in possession as one claiming under the defendant in *fi. fa.*, and claiming under the defendant in *fi. fa.* by a title passing from him after the date of the mortgage.

And it follows also, perhaps, that both parties were estopped from saying, that the defendant in *fi. fa.* did not have title at the date of the mortgage, for both parties claim under the defendant in *fi. fa.* 2. *Green. Ev. Sec. 307.*

[1.] We think then that the Court was right in refusing a non-suit.

The motion for a non-suit being overruled, the claimant offered the following evidence: the mortgage, the record of the proceedings for the foreclosure of the mortgage, and the minutes of the corporation—the defendant in *fi. fa.* This evidence he offered, for the purpose of showing, that the mortgage was executed without authority from the corporation, and was therefore void.

The Court rejected the evidence, deciding, that to receive it, would be to allow the judgment of foreclosure of the mortgage to be attacked “collaterally;” and that the claimant was a person who had no right to attack that judgment collaterally.

Is it true then, that the claimant was such a person? This is the next, and only remaining question.

A judgment is conclusive upon those who are parties or privies to it, and upon none others. As to all others, it is generally no evidence at all; never more than *prima facie* evidence. This is indisputable. 1. *Green. Ev. Sec. 522, et seq.*

It follows that all others, than parties or privies, may attack the judgment, whenever and wherever it comes in their way; may therefore attack it “collaterally.”

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This being so, the question is, was the claimant a party, or a privy, to the judgment of foreclosure?

The relation in this respect, which the claimant bore to that judgment, was the same as that which the plaintiffs, in the general judgments, had borne to that judgment; for the only interest which he had in the property was the interest which he acquired by purchasing the property when it was sold under their judgments. What those plaintiffs had the right, then, to sell under their judgments, was what he purchased.

Were the plaintiffs in those judgments parties or privies to the judgment of foreclosure?

They were neither. They were no more parties or privies to that judgment, than was the plaintiff in that judgment, a party, or a privy, to their judgments. *McDougald vs. Hall*, 3 *Kelly*, 174.

They then, not being parties or privies to that judgment, and the claimant bearing the same relation to it which they had borne, he was not a party or a privy to it.

It follows, therefore, that the claimant was a person who had the right to attack that judgment *collaterally*.

This being so, it must have been an error in the Court below, to hold that the claimant was a person who did not have this right.

We think it was an error, and therefore, we think that there should be a new trial; but this is all that we say. We say nothing whatever as to what would have been the value of the evidence, if it had been received, or even as to whether it might not be such evidence as was subject to other objections to its being received at all. We simply say, that the judgment of foreclosure was no bar to the admission of the evidence. These other questions, were not argued; we were asked not to decide them. Hence as to them, we say nothing.

Judgment reversed.

Judge LUMPKIN was absent during this Term of the Court, on account of indisposition.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATHENS,
MAY TERM, 1857.

*Present—CHARLES J. McDONALD, } Judges.
HENRY L. BENNING, }

No. 1.—JAMES W. SMITH, plaintiff in error, vs. FRANKLIN D. GONDER, defendant in error.

In an action of trespass, for felling and carrying away trees, the damages to be recovered, will be, at least, equal to the value of the trees, as they lie felled.

Trespass quare clausum frangit, in Warren Superior Court.
Tried before Judge Thomas, at October Term, 1856.

This was an action of trespass brought by James W. Smith, against Franklin D. Gonder, for entering plaintiff's premises and cutting down and carrying off his trees. Damages were laid in the declaration at eight hundred dollars.

Upon the trial, on appeal, plaintiff proved possession of the premises upon which the alleged trespass was committed, and that the land from which the trees were cut, contained about four acres and a half. That there was about one hun-

* Judge LUMPKIN was absent during this Term of the Court, on account of indisposition.

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dred and fifty trees cut by defendant; they were cut for cross-ties for the Georgia Railroad; that each tree would make from five to twenty ties; and were sold to the Railroad at from 25 to 31½ cents a piece; that the land was worth, with the trees upon it, about ten dollars per acre; that the lap of each tree would make a cord of wood, which was worth a dollar and a quarter per cord; the wood would pay the expense of hauling the cross-ties to the road. The land was near the Railroad.

Defendant introduced no testimony.

Counsel for defendant requested the Court to charge the jury, that their verdict could not exceed the value of the land with the trees standing on it; the Court charged as requested. The jury found for the plaintiff \$154: whereupon defendant's counsel moved the Court for a new trial, on the ground, that the verdict was contrary to the evidence and the charge of the Court. The *rule nisi* was made returnable to the next succeeding term of the Court, at which Term, (April 1857,) the rule was made absolute and a new trial ordered, and plaintiff excepted.

Plaintiff's counsel requested the Judge to put on the minutes of the Court his written opinion with the reasons therefor. The Judge wrote out his decision and ordered the same to be entered on the minutes, but refused to write out his reasons therefor, and counsel for plaintiff excepted.

E. H. POTTLE, for plaintiff in error.

STEPHENS & JOHNSTON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

What was the measure of the damages in this case? The value of the trees at the time when they were felled, and at the place where they were felled. This we think was the measure of the damages. *Martin vs. Porter*, 5. *Meas.* §

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Wels. 351; *Wild and others, vs. Holt*, 9 do. 671; *Sedg. Mass. Dam.* 356, 483, 484, and note 485, 486.

The Court below told the jury, that their verdict could not exceed the value of the land with the trees standing on it. That would depend upon whether the trees as they lay felled, were worth no more than the land with the trees standing on it; that is, upon the cost of felling the trees. The charge may possibly have been true, but it does not state the rule.

Was the verdict contrary to the evidence?

Was there any evidence to show, that the amount of the verdict was the value of the trees, as they lay felled?

We think not. There was evidence showing that the trees were cut from four acres and a half of land, and that the land, with the trees standing upon it, was worth ten dollars an acre. The amount of the verdict was \$154. This evidence, then, was not calculated to show, that the trees as they lay felled, were worth the amount of the verdict.

There was also evidence showing, that the number of trees cut, was about one hundred and fifty; that the trees were each made into from five to twenty cross-ties; and that each cross-tie was worth from twenty-five to thirty-one and one quarter cents; and that the laps of the trees were cut up into wood, and that the lap of each tree would make a cord of wood, worth one dollar and a quarter. But there was no evidence showing what it cost to *make* a cross-tie, or what it cost to cut up the laps into wood. Therefore there was no evidence showing how much had to be deducted from the value of the trees in their new form of cross-ties, and wood, to get at the value of the trees, in their old form, viz: the form they had as they lay felled on the ground. Consequently, there was no evidence showing, that first so much had to be deducted, as would leave \$154, the amount of the verdict.

The verdict then, was not *supported* by the evidence. We may say that much of it.

The declaration was for carrying away *trees*, not cross-

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ties and wood. Therefore, the plaintiff was not entitled to recover the value of the cross-ties and of the wood. Had the declaration been for carrying away the cross-ties and the wood, the question, whether the damages would have been the value of the cross-ties and wood, or that value, less the cost of converting the trees into the cross-ties and wood, would have been a doubtful and a different question. See cases cited in *Sedgewick, supra*.

The judgment granting the new trial, will not be disturbed.

It may not be amiss to say, that in finding what was the value of the trees, as they lay on the ground, the fitness of the trees for cross-ties or for fire wood, or for any other useful purpose, as well as the convenience of their situation to a market, ought to be taken into consideration. And showing the value of that into which the trees might be converted, and the cost of the process of conversion, might be one way of arriving at the value of the trees.

Judgment affirmed.

NO. 2.—LEROY PATILLO, plaintiff in error, vs. JOHN BARKSDALE, defendant in error.

A citizen of Alabama died leaving no property of any sort in Georgia.

Held, That the Courts of Ordinary of Georgia, had no power to grant letters of administration on his estate.

REVOCATION OF LETTERS OF ADMINISTRATION, in Walton Superior Court. Decision by Judge JACKSON, at February Term, 1857. Appeal from Ordinary.

Peter Stubblefield, formerly a citizen of Georgia, removed to the State of Alabama, where he died.

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Letters of administration on his estate were granted by the Court of Ordinary of Walton county in the State of Georgia, to Leroy Patillo. It was admitted that the deceased left no property or effects in the State of Georgia, and that at the time of his death he was a citizen of Alabama, and that the object of obtaining administration in Georgia, was to enable the administrator, under the Judiciary Act of 1799, to establish a copy of a lost deed, executed by said Stubblefield, while in life.

The Ordinary of Walton county, on motion of John Barksdale, by his attorney, granted a *rule nisi*, requiring Patillo to show cause why his letters of administration should not be revoked, upon the grounds—

1st. Because, at the time of his death, Peter Stubblefield did not reside in the county of Walton.

2d. Because at the time of his death, said Peter had no assets in the county of Walton.

3d. Because, the Court which granted the letters of administration, had no jurisdiction.

4th. Because, citation neither issued nor was published as is required by law, prior to the appointment of the administrator.

5th. Because, Stubblefield was not possessed of assets in the State of Georgia, at the time of his death.

On appeal from the Ordinary, the Judge of the Superior Court, held, that no letters of administration could be legally granted upon the estate of deceased by the Ordinary of Walton county, and ordered and adjudged, that said letters be revoked and annulled.

To which decision and judgment, counsel for the administrator excepted.

C. D. DAVIS, for plaintiff in error.

HILLYER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Can the Courts of Ordinary of this State, grant letters of administration on the estate of a man, who, at the time of his death, was a citizen of another State, and who had no property of any sort within this State?

We think not.

It seems that no Ecclesiastical Court in England, had power to grant administration on the estate of a person, unless that person left *bona notabilia* within the province over which that Court had jurisdiction. 1. *Williams, Ex'ors* 160.

The largest grant of power given to our Courts of Ordinary, is one to do all such "matters and things as appertain, or relate to the estates of deceased persons." *Pr. Dig.* 239 ; *Id.* 231.

It would seem, therefore, that if there are no "*estates*," there can be no jurisdiction.

The duty of an administrator is, to "well and truly administer on all and singular the goods and chattels, rights and credits" (of the dead man,) "and pay all his just debts, as far as the same will extend." *Pr. Dig.* 227.

If, therefore, the dead man has no property of any sort, within the State, what duties can there be for an administrator to perform? In other words, what need can there be for an administration?

In this case, the object of obtaining letters of administration was to provide a way, not for asserting or establishing a right *in favor* of the dead man's representative, but for asserting and establishing a right *against* that representative.

We do not know of any law which gave the Ordinary the power to grant letters of administration in such a case as this is: and therefore, we think, that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

No. 3.—THOMAS WYNN, plaintiff in error, vs. SIMPSON BOOKER, EFFORD BOOKER and LEROY BOOKER, executors of RICHARDSON BOOKER, deceased, defendants in error.

A declaration was filed; the Clerk failed to annex a process to it. The suit, nevertheless, went on for several years—finally, it was dismissed by the Court, on the motion of the defendant: The ground of the motion being, this want of a process. Pending the suit, the limitation—period for the suit ran out. Within six months from the dismissal of the suit, the suit was renewed.

Held, That the time of the termination of the first suit, was the time when that suit was dismissed, and not the time when the Clerk's right to annex a process to the petition expired; and therefore, *held*, that the new suit was commenced in season.

Action on account, in Wilkes Superior Court. Decision by Judge THOMAS, at March Term, 1857.

This was an action brought by Thomas Wynn against the executors of Richardson Booker, deceased, upon the following account, viz:

RICHARDSON BOOKER,

To THOMAS WYNN, *Dr.*

To one forty-one (41) saw gin, with oil-boxes, sold and delivered to him in September, 1847,	\$87 00
To balance due for repairing two old gins for him in 1847,	6 00
	\$93 00

The defendant's relied upon the statute of limitations.

The facts as agreed upon by the counsel are as follows, viz: The account was admitted, and that an action for the same had been instituted against the testator in his lifetime, in August 1850; that said action was commenced by filing the declaration in the Clerk's office, without annexing any process or a waiver of the same, with the following entry thereon by the Clerk, "Filed 30th August, 1850, J. H. Dyson, Clerk." At March Term, 1856, said action was dismissed

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for want of process, and at the May Term, 1856, of the Inferior Court, and within six months after dismissing the former suit, this action was commenced.

The presiding Judge held, that the plaintiff's demand was barred by the statute of limitations, and so charged the jury, who found for the defendants.

Whereupon, counsel for plaintiff excepted.

GARNETT ANDREWS, for plaintiff in error.

W. M. RHESE, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The first section of the Act of 1843, amendatory of the limitation Acts, is as follows: "That whenever any case now or hereafter pending in any of the Courts of this State, either at law or in equity, commenced within the time limited by law, shall be discontinued, dismissed, or the plaintiff therein become non-suited, and the plaintiff's claim may be barred during the pending thereof, by any law now in force in this State, the plaintiff may at any time within six months from such termination of the case, and not after, renew or recommence the same, in any Court having jurisdiction thereof in this State, any law, usage or custom, to the contrary, notwithstanding: *Provided*, That nothing in this Act shall be construed so as to authorize the renewal of any case after a second discontinuance; dismissal or non-suit." *Cobb's Dig.* 569.

In the present case, the question is, whether the time at which the suit was recommenced was within six months from the time when the first suit was *terminated*.

This question manifestly depends upon this other one—*at what time did the first suit terminate?*

As soon as the declaration in a case is filed, the suit is commenced. *Cobb's Dig.* 474.

The period intervening between the time of the filing of

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the declaration, and twenty days next before the Court to which the suit is returnable, is the period within which the Clerk may annex a process to the declaration.

Suppose the Clerk fails to annex a process to the declaration within that period, does the suit, at the instant of the expiration of the period, become of itself null and void, and thus at that instant, *terminate*?

The eighth section of the Judiciary Act of 1799, does not say so. It merely says, that all "*process*" issued and returned in any other manner, than that which it prescribes, shall be void. *Pr. Dig.* 421. And it does not follow as a *general* principle, that the voidness of a process in a valid suit, necessarily renders the suit itself, void. The *general* rule in such case is, that the suit itself remains unaffected, awaiting an *amendment* of the defect, in respect to the process. This is the *general* rule. It is true, that the Courts of this State, have deduced a different rule from the said eighth section of the Judiciary Act of 1799. *Little vs. Ingram et al.* 16 *Ga. Rep.* 195.

But the rule which those Courts have deduced from that section, has not gone further than to say, that the voidness of of process is a ground for dismissing the suit, and for dismissing the suit at any stage of it. The rule has not gone so far as to say, that voidness of process, *ipso facto*, renders the *suit* void. No decision, I think, has gone the length of saying that the voidness of the original process renders the *suit* void.

If a suit is a void suit, that is to say, is no suit at all, the subpœnas in it, the interrogatories in it, the oaths in it of parties and witnesses, the costs in it, the attorneys fees in it, the interlocutory orders in it, the *ca. sas*, and the *fi. fas.*, and the writs of error in it, must be void also; all must be void. But no decision, I think, has ever gone the length, of saying, that the voidness of the original process, *ipso facto*, made all these void.

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The decisions of this Court have gone no further than to say, that the defect with respect to process is an incurable one, and therefore, one for which a Court is bound to dismiss the suit. The decisions of the Court have not said, that this defect, *per se*, made the suit stand dismissed. *Little vs Ingram et al. Supra. Beall vs. Blake*, 13 Ga. R. 218; 17 Ga. R.

And, I must say for myself, that I doubt extremely, whether the Court in going as far as it has gone, has not gone, by much, too far. The very section of the Judiciary Act next to this eighth section, has in it, these words: "And no petition, answer, return, process, judgment, or other proceeding, in any civil cause, shall be abated, arrested, quashed or reversed, for any defect in matter of form, or for any clerical mistake, or omission, not affecting the real merits of the cause; but the Court, on motion, shall cause the same to be amended, without any additional cost at the first Term, and shall proceed to give judgment according to the right of the cause, and matter of law, as it shall appear to the said Court, without regard to such imperfections in matter of form, clerical mistake, or omission."

Now, what is the failure to annex a process to a declaration, but a "clerical" "omission not affecting the real merits of the case?"

By the common law, process had to be issued, and served, before the declaration could be filed. The declaration was not served by the Sheriff at all.

By the said eighth section of the Judiciary Act of 1799, things have been reversed: the declaration has to be first filed, then the Clerk has to "annex" a process to it, and then the Sheriff has to serve both declaration and process on the defendant at the same time, and then he has to return them thus served to Court.

The section closes itself in these words: "And all process issued and returned in any other manner than that hereto-

fore directed, shall be, and the same is hereby declared to be, null and void.”

Now if process should be issued and returned in the *old* manner—that is *by itself*, and *before* the filing and service of the declaration, it would be issued and returned in a manner different from that prescribed by the section, for it would be *issued* without being *annexed* to the petition; would be *served* without the *accompanying service* of the petition; and would be *returned* without the *accompanying return* of the petition.

And did these closing words of the section, mean to say anything more, than that, if process should be issued and returned in *this* manner, such process should be null and void? I doubt it extremely.

Does not the above quoted part of the ninth section give me warrant for my doubt? I think it does.

And then, is not the Act of 1818, to amend this very Judiciary Act, sufficient to carry this doubt almost, if not quite, into a certainty? I think so. The preamble and the first section of the Act of 1818, are as follows:

“*Whereas*, the said Judiciary was intended for the purpose of bringing parties litigant to a speedy judicial decision, without delay, and with as little costs as practicable, and it was thereby intended, that the small omissions of parties, Clerks or Sheriffs, not affecting the real merits of the cause should in all cases (substantially set out,) be amended on motion, without delay or costs, and it having grown into practice in said Courts, to give or grant a term, and sometimes non-suit, for the smallest omissions of the officers of the said Courts, and as a further increase of the said practice, may lead us back to all that tedious and expensive labarynth of special pleadings, which the said Judiciary intended to avoid:

“*SEC. 1. Be it enacted, &c.* That in every case where there is a good and legal cause of action, plainly and distinctly set forth in the petition, and there is in substance a copy served on the defendant or defendants, or left at their

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most notorious place of abode; every other objection shall be on motion amended without delay or additional costs." *Pr. Dig.* 442.

If there is a good cause of action set out in the petition, and a copy, in substance, of the *petition*, (not petition and process,) served on the defendant, *every other* objection shall be amended without delay, or costs. This is the statute.

And must not all objections, that are objections concerning process, be objections, "other," than those that are objections concerning the sufficiency of the cause of action stated in the petition, or objection concerning the sufficiency of the service of the petition. Surely it does seem so. But if so, then the statute says that such objections are instantly amendable.

I cannot help deeply doubting the correctness of the decisions to which I have referred, participating though I did in some of them.

However, none of those decisions is that the nullity of the process, *ipso facto*, renders the suit itself a mere nullity. On the contrary, they are all decisions in which it was held, that the nullity of the process is a cause to authorize a Court to dismiss the suit. And this would seem to imply, that such nullity of process, is not a cause, which of *itself*, renders the suit void; for if it were such cause, then a judgment of a Court declaring the suit void, would be superfluous. The Court is not disposed to go further than any decision has yet gone.

Consequently, we think that the suit in the present case, did *not* come to a termination the moment the time expired, within which the Clerk might have annexed a process to the petition. We think that the suit did not come to a termination, until the Court, on the motion of the defendant in the suit, dismissed it.

This suit was commenced within six months from the time when that was dismissed. We think therefore, that it was commenced in season; consequently we reverse the judgment of the Court below.

Judgment reversed.

 Henderson vs. Almond.

No. 4.—JOHN T. HENDERSON, plaintiff in error, vs. JAMES ALMOND, defendant in error.

A gin was sold to defendant by a firm of which the plaintiff was a member; a note under seal was given for it. The firm contracted "to furnish the defendant with a forty saw gin, which they warranted to be as good as any gin made, if not, they would furnish one that would." The gin was furnished, but it broke, and was delivered over to a person employed by plaintiff to repair it if necessary; it was repaired. It broke a second time and was delivered to the same employee of plaintiff to be repaired, and was never returned. *Held*, That as the gin was delivered to plaintiff's agent to repair, it was the same as a delivery to plaintiff, and notice was not necessary.

Debt on single bill, in Elbert Superior Court. Tried before Judge THOMAS, at March Term, 1857.

This was an action of debt brought by John T. Henderson, against James Almond, on the following instrument, viz :

"By the 25th day of December, 1853, I promise to pay Henderson & Chisolm, or bearer, eighty dollars for value received.

Witness my hand and seal, this November, the 30th, 1852.
JAMES ALMOND, L. S."

Indorsed—"Received on the within note four dollars, this 23d Oct. 1854."

The defendant pleaded:

1st. The general issue.

2d. That said single bill was given for a forty saw gin, sold to defendant, and that the consideration had wholly failed, and the gin was worthless.

3d. That Henderson & Chisolm, from whom the gin was purchased, and of which firm, plaintiff is a member, warranted the gin to be as good as any gin made, if not, that they would furnish such a one, and avers a breach of said warranty.

Before introducing his testimony, plaintiff moved to strike

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defendant's pleas, on the ground, that by accepting a written warranty, he was precluded from the defence set forth in the pleas and must resort to his action on the warranty. The Court overruled the motion and plaintiff excepted.

Plaintiff then read in evidence the single bill, and closed his case.

Defendant then offered the warranty of Henderson & Chisolm; proved that plaintiff was one of that firm, who were gin makers, at Covington, Georgia, and that the note sued on was given for a forty saw gin purchased from them.

That he ginned some four or five bales of cotton, when the head-block broke; it ginned about two bales a day. He had the gin repaired by Mr. Oglesby, and again put it in operation, and ginned about four or five bales, when it again broke; it was again carried to Mr. Oglesby's to be repaired, where it has remained ever since, never having been replaced. The ginning done was not worth more than the trouble in putting up and taking down the gin.

Mr. Oglesby, testified, that he was authorized by Goss the agent of Henderson and Chisolm, to repair the gin, if necessary; at their expense; that he mended the head-block when it broke, and made it smaller, to increase the speed. The second failure was owing to the breaking the Cylinder, caused by a defect in the material, and not by any fault in the management of the gin. Witness is a gin-maker; after the last failure, the gin was entirely worthless for ginning.

Plaintiff in reply, offered the testimony of *William J. Cushing*, taken by commission, who testified, that he was at defendant's house in October, 1854, and the gin was then running, and defendant seemed pleased with it, but complained that it *napped* the cotton, and said that the pulley or head-block had been broken and repaired. Witness was the agent of plaintiffs, and presented the note for payment, and defendant said he was then out of money, but would soon pay it. Witness remained several days at defendant's house,

being sick, and on leaving, offered to pay his bill, but defendant refused to receive it, and told him to credit it on the note, which was done.

Plaintiff's counsel requested the Court to charge the jury: That it was the duty of the defendant to give notice of the failure of the gin, and to demand another according to the warranty, and if it is not proved that he did so, his defence is not good; that if the warranty was the consideration of the note, and the gin failed, notice of such failure should be given before his present defence could be available, and if they should believe that the gin was of any value or benefit to the defendant, there being no plea of partial failure of consideration, they should find for plaintiff the whole amount of the note; which charges the Court refused, but charged that, if the consideration of the note was a gin, and it was wholly worthless, they should find for defendant; and if the consideration was the gin and warranty, and the gin had not come up to the warranty and a new one had not been furnished according to the warranty, they should find for defendant; and that it was not the duty of defendant to give notice to the warrantors of the failure of the gin.

To which charges and refusal to charge, counsel for plaintiff excepted.

HESTER & AKERMAN, for plaintiff in error.

THOMAS, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

This is an action on a single bill, dated 30th November, 1852, payable by the 25th December, 1853; suit brought 31st December, 1855. It was given for a gin, delivered under a contract made by defendant, with a firm of which plaintiff was a member, dated 8th March, 1852, by which the payees agreed "to furnish the defendant with a forty saw-gin, as

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good as any made, if not, they would furnish one that would." Under our statutes and the decisions of this Court, the plea of failure of consideration is a good defence if sustained by the evidence, and also a plea of partial failure of consideration, instead of driving the party to his cross action. But here was a special contract, and the question is, whether the parties did not stipulate among themselves, that instead, of a rescision of the contract, by the purchaser, on the failure of the gin to perform well, he was not bound to accept another in lieu of the one first furnished, and to enable the party to do it, to give notice of the failure? There are but two members of the Court presiding, and they differ on this point. The consequence would be, that the judgment of the Court below must be affirmed, because of this disagreement, if the case were to stop here. But as we are both inclined to hold, that the witness Oglesby was sufficiently the agent of the plaintiff to bind him by his conduct, we prefer to put the judgment of affirmance on a different ground. Oglesby was employed by plaintiff's agent to repair the gin, if necessary. The head-block broke and he did repair it. When the cylinder broke, defendant sent it to him to be repaired again, and it was never returned. Mr. Oglesby was the employee of the plaintiff, (or which is the same thing, of the firm of which he was a member,) to repair this identical gin. Mr. Oglesby was not the agent of the plaintiff to receive notices, but he was the agent to repair the gin, and when delivered to him for that purpose, the gin was in the possession of the plaintiffs. It would be a good defence to an action of trover against the defendant for this gin, that it was delivered to plaintiff's agent by his authority. The delivery of the gin to plaintiff's employee to be repaired, and his keeping it, is equivalent to notice to plaintiff.

Judgment affirmed.

No. 5.—ANDREW J. NICHOLS, plaintiff in error, vs. CICERO H. SUTTON and JOHN G. PORTER, defendants in error.

- [1.] An order of the Inferior Court to certain persons, as commissioners to examine the change of location of a public road, with instructions, that if they found the proposed alteration of public utility, to mark out the same and report to the Court. They do mark out and report to the Court, and the Court orders that the party applying, be allowed to open the road at his own expense, this is an order to change the road.
- [2.] The Inferior Courts have authority to make or alter or establish public roads, and beyond this, their jurisdiction is to enforce the road laws and to compel officers in subordinate authority to discharge their duties.
- [3.] To open a road which has ceased to be a public road, and to remove fences, &c., are trespasses, for the prevention of which, an injunction will not lie, there being an adequate remedy at law.
- [4.] There is a remedy by Certiorari, for the errors of the Inferior Court, in road cases.

In Equity, from Habersham Superior Court. Decision by Judge JACKSON, at chambers, 27th March, 1857.

This was a bill by Andrew J. Nichols, against Cicero H. Sutton and John G. Porter, road commissioners for the Clarks-ville district, in the county of Habersham.

The bill alleges that complainant had applied to the Inferior Court of said county, to allow him to change the public road running through his premises, and to do so at his own expense. That said Court passed an order authorizing complainant to change said road and to locate it as indicated in his application.

The bill further alleges, that complainant, in pursuance of said authority, did change said road, and opened and located a new road, upon the ground designated in said order, and at his own very great expense, and that he fully complied with all the terms imposed by said Court. That afterwards, said Court upon the petition of certain persons, and without notice to complainant, and without his consent, passed an order directed to said Sutton and Porter, road commissioners, to re-open said road through the then enclosed land of com-

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plainant. That said commissioners in obedience to said order, had gone upon the premises of complainant, and had pulled down his fences, which he at once put up again, but he fears and apprehends that said commissioners by virtue of said order, will again enter and throw down his fences and re-open said road, to the great and irreparable injury of complainant.

The bill prays an injunction against said commissioners, &c.

The Chancellor refused to sanction the bill and to grant the injunction on the following grounds:

1st. Because the order allowing complainant to make and open a road at his own expense, did not authorize him to stop up the old road.

2d. Because, the Inferior Court subsequently ordered the road that had been obstructed to be re-opened, and that Court has exclusive, original jurisdiction of roads, &c. under the statutes of Georgia, and may at any time open and alter roads.

3d. Because, if the Inferior Court acted illegally, the proper remedy in the opinion of this Court, is by certiorari, and not by injunction from this Court against the commissioners acting under the authority and in obedience to an order, legal, until reversed.

To which decision counsel for plaintiff excepted.

AKERMAN; and PEEPLES, for plaintiff in error.

HULL, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] We are not prepared to sustain the Judge below, on all the grounds, on which he refused to sanction the injunction in this case; but on some of them, we affirm his judgment. The petition of Nichols to the Inferior Court, was to alter the

location of the road leading from the Loque bridge to the Vandyke bridge. The Court appointed commissioners to examine the matter with instructions that if they found the proposed *alteration* of public utility, to mark out the same, and report to the Court. The road was marked out and an order passed for the complainant to open it at his own expense. He did open it at great expense, and that was an order to alter the route; it was to open the old road, and the Court cannot say that they meditated a fraud upon the complainant by which he should be forced to encounter great expense, and then be debarred from the right he sought to acquire.

[2.] The Inferior Court had jurisdiction of the case, unquestionably, but they cannot capriciously exercise their jurisdiction to the injury of the citizen. To possess a power is one thing, but to exercise that power properly and legally is another. The Inferior Courts have power to make and alter roads, and when a road is once made or altered agreeably to law, and perhaps, not in strict conformity to law, and the order or judgment of the Court, in respect thereto, is unreversed, or not revoked according to law, the road so made or altered, must stand as established. The order of the Inferior Court complained of in the bill, is not an order to make or alter a road, but to take measures to have all obstructions removed from a certain road, and to have it put in good order and repair. If, by a prior order of the Court, that road had ceased to be a public road and the right of occupation thereby reverted to the owner of the soil, the last order was an order to commit a trespass. If the road was a public road, it became the duty of the commissioners of roads, on being informed of the obstructions, if they did not know of them, to proceed under the act against the person who placed them in the road; and it was the duty of the overseer of the road to cause them to be removed. *Cobb's New Dig.* 949. If the overseer neglect his duty, he is amenable to the commissioners of roads. *Ib.* 948. The commis-

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sioners are liable to the Inferior Court for their neglect of duty; and in this manner, the Inferior Court have a right to hear and determine matters relative to roads. When they lay out or alter a road, or establish a public road, their authority ceases in regard to the road, except as a tribunal to enforce the road laws and compel officers in subordinate authority to discharge their duties. In regard to the question as to which of the two is the public road, the last order of the Court leaves it as it found it.

[3.] If the first order authorized the complainant to turn the road, and he complied with the terms on which it was granted, the entry of persons on his premises and removing his fences, &c. are trespasses for which they are liable as in ordinary cases. The case made by the bill does not come within the class of injuries that the law considers irreparable, nor is it of such a nature as requires an answer from the defendants to ascertain the extent of the injury the complainant has sustained. There is an adequate remedy at law.

[4.] If the order of the Court had been such as to have made it necessary to complainant to annul it, he might have moved its revocation before the Inferior Court, and if they had illegally refused to revoke it, their decision would have been open to review before the Superior Court. If the complainant had desired it, there was nothing in the way of his having the proceedings of the Inferior Court in passing the order, re-examined by certiorari in the Superior Court; that the proceeding was *ex parte*, is no objection, for in such cases, where a party injured has no notice, the Court would not deny his constitutional right to have errors complained of in the proceedings reviewed, and if any, corrected before the Superior Court. We cannot sanction the principle, that every controversy respecting roads is to be converted into a case for a Court of chancery.

Judgment affirmed.

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No. 6.—ZEBULON B. CRAIG, plaintiff in error, vs. MADISON L. ADAIR, defendant in error.

[1.] If a *fi. fa.* has been issued it must be returned before the Clerk can issue a *ca. sa.*

[2.] In an action against a public officer for the recovery of damages for breach of duty, it is no error for the Court to charge the jury, in the absence of proof of breach of duty, that they could not presume damages had been done the plaintiff.

Case, in Gwinnett Superior Court. Tried before Judge CABINNESS, at March adjourned Term, 1857.

This was an action on the case brought by Craig against Adair, Clerk of the Superior Court of Gwinnett county, to recover damages alleged to have been sustained by neglect and refusal of defendant to issue a *ca. sa.* when requested by plaintiff.

The declaration averred that one George W. Ambrose, obtained judgment in the Superior Court of said county, against one Daniel H. Rutan as maker, and plaintiff as indorser of a note for the sum of sixty dollars, besides interest and cost. That a *fi. fa.* issued thereon; that afterwards Rutan being about to leave the State, plaintiff requested defendant as Clerk aforesaid, to issue a *ca. sa.*, which he failed and refused to do, and that Rutan afterwards left, without discharging said judgment, and plaintiff had to pay the same, whereby he was damaged to the amount of one hundred dollars.

Defendant pleaded:

1st. The general issue.

2d. That the *fi. fa.* which had been issued in the case, had not been returned to his office at the time of the alleged request to issue the *ca. sa.*

3d. That defendant is liable for neglect of official duty, only by suit on his official bond.

4th. That plaintiff in said *fi. fa.* has long since been fully

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paid; and that plaintiff never ordered a *ca. sa.*, after he had a right to control said *fi. fa.*

Plaintiff introduced the following testimony, to-wit:

The *fi. fa.* in favor of George W. Ambrose against Daniel H. Rutan maker, and Z. B. Craig indorser: principal \$60. Judgement entered 16th September, 1853. *Fi. fa.* issued 5th October, 1853, with an entry of *nulla bona*, 25th November, and the payment of the same by Craig, the plaintiff.

George W. Ambrose, testified, that he went to defendant a few days before Rutan ran away and requested him to issue a *ca. sa.* against him; defendant replied, why don't you make your money out of Craig; he has got property here, a house and lot, &c. Witness said it was doubtful whether Craig had property, and he thought the titles to said lot were in some one else; and that not only he, but Craig wanted the *ca. sa.* to issue; that Rutan left for parts unknown in a few days after, and witness thought that if a *ca. sa.* had been issued, he could have got the money out of him.

P. S. Sterling, testified, that a short time before Rutan left, he held a demand of seventeen dollars against him, and he let him have a pony for his debt, which he afterwards sold without seeing it, for the amount of his demand; did not think Rutan had then much property, or but little if any that could be levied on; had property some two or three years previous.

Zimriah Brooks, testified, that Rutan left this country the Saturday night before the first Tuesday in March, 1854.

Defendant introduced *T. L. Graves*, who testified that he arrested Rutan, a short time before he left, under a *ca. sa.* for seven or eight dollars; did not take any bond from him, let him go at large to get security, and he wanted him a few days afterward to serve some notices of his intention to take the benefit of the insolvent debtor's Act: that he would not let witness come near him, as he was expecting a *ca. sa.* in favor of Ambrose to come against him every day; did not

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think he had property to levy on at that time, but had property two or three years before.

Here defendant rested.

The Court charged the jury :

1st. That it was illegal for the defendant while Clerk, to issue a *ca. sa.*, and he was not bound to do so, until the *fi. fa.* was returned to office, and the jury were to determine from the evidence, whether the *fi. fa.* had been returned to the Clerk when he was requested to issue the *ca. sa.*

2d. The Court charged the jury that the plaintiff was only entitled to recover the actual damages proved, and they could not presume damages, but must look to the evidence to ascertain the damages sustained by plaintiff.

To which charge, counsel for plaintiff excepted.

The jury found for the defendant, and counsel for plaintiff moved for a new trial, on the grounds, that the charge of the Court was erroneous, and that the verdict was contrary to law and evidence.

The Court overruled the motion for a new trial, and counsel for plaintiff excepted.

HULL ; and GLENN, for plaintiff in error.

PEEPLES, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The first assignment of error is on the charge of the Court to the jury, that the Clerk, who was defendant in this case, could not have legally issued a *ca. sa.* against the body of the defendant, until the writ of *fi. fa.* which had been issued against his property, was returned to office. This charge is unquestionably correct. In case one execution prove ineffectual, another may be sued out ; but there ought not to be two executions, one against the body and another against the property, at the same time. If a *fieri facias* has been issu-

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ed, and the party wish a *ca. sa.*, the Sheriff ought to return the *fi. fa.* 1. *Sellon's Pr.* 535. Our statute directs that if a *ca. sa.* has been issued against a defendant, he may point out property and give security that it is *bona fide* his, and subject to the payment of the debt, and it shall then be the duty of the Sheriff to return the execution against the body and take out an execution against the property of the defendant. This is a legislative construction that there cannot be two executions, one against the body and another against the property, proceeding from the same debt against the same defendant, at the same time. We think the charge of the Court was strictly legal on this point.

[2.] The charge of the Court on the subject of damages, must be considered in reference to the pleadings and the evidence in the case. It would not have been proper for the Court to have charged the jury on a state of things neither alleged nor proved. The *fi. fa.* was issued on the fifth of October, 1853. It was made returnable to the next Court to sit on the second Monday in March, 1854. An entry of *nulla bona* is indorsed on the *fi. fa.*, bearing date on the 25th of November, 1853, but it does not appear when it was returned. There is no allegation of its return in the declaration. Before the first Tuesday in March, 1854, the defendant, Rutan, ran away, and it was a few days before that, that the plaintiff, Ambrose, asked the Clerk to issue a *ca. sa.* When a plaintiff sues an officer for a breach of duty, it is necessary for him to prove every fact necessary to constitute that breach of duty. There was no proof of the return of the *fi. fa.*, and the law will not presume its return prior to the Term of the Court to which it was made returnable. From the facts proven, there was no breach of duty, and without a breach of duty by the officer, damages will not be presumed. If the plaintiff had sustained actual damages by the defendant's failure to issue the *ca. sa.*, it is his own fault. The Sheriff was not bound, without demand, to return the execution before the return Term; the Clerk could not have issued the *ca.*

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ca. before its return, but the plaintiff might have required the Sheriff to return the *fi. fa.* to the office for the purpose of obtaining a *ca. sa.* This he did not do.

It is not necessary to consider whether this plaintiff could have a right of action in this case, even if the *fi. fa.* had been returned and the Clerk had refused to issue the *ca. sa.* on demand. He was a security, and if he had paid the debt and taken the control of the execution at the time the *ca. sa.* was applied for, he could have controlled the judgment and execution against the property only of his principal.

From what we have said, it will be seen that the motion for the new trial ought not to have prevailed.

Judgment affirmed.

No. 7.—LARKIN R. GUNN, plaintiff in error, vs. ISAAC HOWELL, garnishee, and the administrator of James M. Calloway, deceased, defendants in error.

After an acquiescence of twelve years or more, in a judgment, and its payment, it is too late to move to vacate it, where there is no fraud or circumvention.

Motion to vacate and set aside judgment, in Taliaferro Superior Court. Decision by Judge THOMAS, at August Term, 1856.

James M. Calloway as bearer, brought suit to the January Term, 1837, of Taliaferro Superior Court, against Archibald G. Jones and Larkin R. Gunn, on three promissory notes, of five hundred dollars each.

On the 7th February, 1839, *scire facias* to make parties, was issued, reciting that Calloway had died and that Mal-

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coltn' Johnston and Samuel Johnston, had been appointed his administrators, and that he had, prior to his death, instituted his action of assumpsit for the sum of *five hundred dollars*, besides interest, against said Jones and Gunn. This *scire facias* was made returnable to the next Term of Taliaferro Superior Court, and required Gunn and Jones, or their attorneys, to show cause why said administrators should not be made parties, &c.; and was served by leaving a copy at the "most notorious abode of A. H. Stephens, attorney for defendants."

At the March Term, 1839, of said Court, in the case of James M. Calloway, ^{vs.} Larkin R. Gunn, and Archibald G. Jones. } *Scire facias.*

The presiding Judge made the following entry on the docket—" March, 1839, parties made, and verdict."

Upon the execution docket, was the following entry :

<p>"Malcom Johnston, and Samuel Johnston, administrators, <i>vs.</i> Archibald G. Jones, principal, Larkin R. Gunn, security.</p>	}	<p>In Taliaferro Superior Court. Judgment signed, March 7th, 1839. <i>Fi. fa.</i> issued March 14th, 1839.</p>
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Principal debt,	\$1,500 00
Interest to judgment,	170 00
Costs,	14 68½
I know of no property subject to the within <i>fi. fa.</i>	

G. OVERTON, Sheriff.

March 16th, 1839."

Afterward, Isaac Howell was garnisheed by plaintiffs, and at March Term, 1843, upon his answer and return, judgment was taken and signed against him for the sum of \$2,011 58,

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the amount which he admitted was in his hands belonging to Gunn, and it was proved that Howell the garnishee paid off the judgment.

In this state of things, at the August Term, 1856, the following motion was made, to-wit :

<p>“James M. Calloway, vs. Archibald G. Jones, and Larkin R. Gunn, security.</p>	}	Taliaferro Superior Court.
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Ordered, That judgment in the above stated case be vacated and rendered invalid, it appearing to the Court that said judgment was rendered in favor of the plaintiff after his death.”

Which motion upon argument, was refused, and counsel excepted.

Counsel for Gunn, then moved to take the following order:

<p>“Malcom Johnston, and Samuel Johnston, vs. Archibald G. Jones, and Larkin R. Gunn, Isaac Howell, garnishee.</p>	}	In Taliaferro Superior Court. Judgment and garnishment.
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It appearing to the Court that at the March Term, 1843, of said Court an order was had, allowing judgment to be signed against the garnishee, Isaac Howell; that judgment was signed against him in pursuance of said order, on the 8th of March, 1843; that at the February Term, 1856, of said Court, an order was taken, amending *nunc pro tunc* the above mentioned order, taken at March Term, 1843; and it further appearing, that the original judgment against Jones and Gunn, on which said garnishment is founded, is in favor of James M. Calloway; that said original judgment is void, because said Calloway was dead when verdict was rendered and judgment taken, and before *parties* were, or could, from

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the state of the record and pleadings, have been made; that the Sheriff did not, at the proper time, make the proper entry upon the execution founded on said judgment; and it further appearing that the *nunc pro tunc* order was taken, without notice to Jones and Gunn, or their being represented by counsel, and after the death of both Jones and Gunn; that the facts recited in said *nunc pro tunc* order, as legally appearing to the Court, did not appear; that if the facts did appear as recited in the *nunc pro tunc* order, they were not sufficient to authorize either the original or *nunc pro tunc* order; that the *nunc pro tunc* order, alters the sounding and caption of the case, and was taken twelve years after the order which it amends, *nunc pro tunc*; therefore it is ordered that the judgment against Isaac Howell, and the order allowing said judgment to be signed, be both vacated, and that the *nunc pro tunc* order be vacated also."

Which order was wholly and in every part refused; and counsel for Gunn excepted.

In support of the first moved order, the following entry upon the minutes of the Court, was used in evidence, to show the death of James M. Calloway, previous to the rendition of judgment.

"Wednesday morning, March 6th, 1839.

The Honorable Superior Court met pursuant to adjournment—Present his Honor, GARNETT ANDREWS, Judge.

Larkin R. Gunn,

vs.

James M. Calloway,
Thomas J. Shackelford,
Archibald G. Jones.

} Death of Calloway, suggested."

After the refusal of the above stated motion, Malcom Johnston and Samuel Johnston, representatives of James M. Calloway, deceased, by their counsel, moved to take the following order, to-wit:

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"Friday, August 29th, 1856.

James M. Calloway,

vs.

Archibald G. Jones, and

Larkin R. Gunn.

} In Taliaferro Superior Court.

Scire facias, on the suggestion of the death of plaintiff, James M. Calloway, having issued returnable to the March Term, 1839, of said Court to make Malcom Johnston and Samuel Johnston as administrators, &c. of James M. Calloway, deceased, parties plaintiffs, in lieu of said James M., deceased, and it appearing to the Court that said Malcom and Samuel were, as such administrators, made parties plaintiff, in said original case, at the said March Term, 1839, before the verdict and judgment were rendered in said original case, which said verdict and judgment were generally in the name of the plaintiffs without specifying any particular plaintiff; and it further appearing to the Court, that the order making such parties plaintiffs, was omitted, by mistake, to be entered upon the minutes of the Court, at the proper term: It is ordered by the Court that this order be entered upon the minutes of this Court as of the March Term, 1839, making said Malcom and Samuel as administrators, &c., of James M. Calloway, deceased, parties plaintiffs, in lieu of said James M. deceased; and it is further ordered, that said verdict and judgment in said original case stand in the name of said Malcom and Samuel, as such administrators, who were the parties plaintiffs at the time such verdict and judgment were rendered in said original case. This order to be entered *nunc pro tunc*."

Which order, upon argument had, was allowed, and entered upon the minutes of the Court, and counsel for Gunn, excepted.

FOUCHE & ANDREWS, for plaintiff in error.

THOMAS; and L. STEPHENS, represented by T. R. R. COBB, for defendants in error.

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By the Court.—McDONALD, J. delivering the opinion.

This case brings up three distinct judgments pronounced in the Court below on three motions, in one of which Isaac Howell was a party, and in the other he was not a party. A motion was made to dismiss the bill of exceptions, for want of service on Isaac Howell, or his attorney; service was acknowledged, and the acknowledgment is in the following words:

“I acknowledge service of copy of the within bill of exceptions, and agree that the exceptions to all the motions be taken up in one bill, this the 4th day of October, 1856.

(Signed,)

LINTON STEPHENS.”

Mr. Stephens did not sign as attorney for either of the parties. Only two members of the Court presided; my brother BANNING, was of opinion that the service was not sufficient in the case to which Howell was a party, it having been stated in the argument, that Stephens did not represent Howell in the Court below, and there being nothing of record to show that he did, and he not having signed as attorney for any one. I thought the service sufficient. Mr. Stephens is a known attorney of the Court, and the acknowledgment embracing a consent that the exceptions to all the motions be taken up in one bill, and he not signing for any particular defendant, ought to be held to have acknowledged for all. It was admitted, that he is now the attorney of Howell. A question then arose as to the effect of this disagreement. My own opinion was that no judgment could be pronounced on the motion to dismiss, and that the cause must proceed. My brother BANNING, however, entertained a different opinion, and thought that he could not hear a case, which he conscientiously believed was not before the Court, for the want of proper service. The consequence was, that the cases to which Howell was not a party could alone be heard.

The first of the motions to which Howell was not a party,

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in the order in which they are presented in the bill of exceptions, is the motion to vacate and render invalid a judgment in favor of James M. Calloway vs. Archibald G. Jones and Larkin R. Gunn, on the ground, that it had been rendered in favor of the plaintiff, after his death. The Court refused the motion, and on that refusal, error is assigned. The judgment was rendered on 7th day of March, 1839. At March Term, 1839, the case was stated against the defendants, in the name of James M. Calloway, and not in the name of his administrators, and entitled "*scire facias*." The *scire facias*, by the way, a very irregularly drawn process, issued in the name of the administrators, on the 7th day of February, 1839, calling on the defendants or *their attorney*, to show cause why the administrators should not be made parties plaintiffs, and why a judgment should not be rendered accordingly in such case made and provided. At the Term of the Court at which the defendants were required to appear personally or by attorney, to show cause as aforesaid, the presiding Judge made the following entry on the docket: "Parties made, and verdict for plaintiff." The presumption is, that parties were made as proposed in the *scire facias*, to-wit: That the administrators were made parties plaintiffs, in lieu of the deceased James M. Calloway. The verdict of the jury is for the plaintiff. The administrators were then plaintiffs. The Clerk issued an execution seven days after the date of the judgment, in favor of the administrators as plaintiffs, and the Sheriff two days thereafter, made his return thereon. A garnishment was issued and the debt and effects of one of the defendants was levied on in the hands of a third person, judgment entered against him, and the money collected. The parties, defendants and garnishee, have acquiesced in the judgments against them respectively, ever since the 8th of March, 1843, up to the movement in 1856. No fraud is alleged or complained of against the plaintiffs. The history of the case as detailed here, shows that the only matter complained of was the omission of the Clerk to put on the minutes an order to make

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parties, which we are bound, upon legal principles, to presume was passed by the Court. The motion to set aside the judgment, was predicated, then, on mere official neglect in the Clerk, nothing more. It was a want of adherence to a mode of proceeding, and was the omission to put an order to make parties on the minutes, which was necessary, to the due and orderly conducting of the suit. *Tidd's Practice* 512. The application to set aside proceedings for irregularity should be made as early as possible; and if there has been any irregularity, if the party overlooked it, and took subsequent steps in the cause, he could not afterwards revert back to the irregularity and object to it. *Tidd* 513.

The parties were made, so says the evidence; the judgment was rendered, so says the record; and the money is presumed to have been long since paid—more than twelve years ago. No precedent, I apprehend, can be found, where the Court has set aside proceedings for such an irregularity, where there has been a final close of the business, the money paid, and thirteen years acquiescence. In the case of *Soulden & Smith vs. Cook*, 4 *Wendall's Reports* 217, the Court refused to set aside a judgment for irregularity after a lapse of ten years, and held that where there was no fraud or circumvention, it should not, after so long a time, be set aside on its merits.

It may be seen from what has been said, that in our opinion, there was no error in the order to correct the judgment, however unnecessary it was to do it at this late day; we will presume that the Court had sufficient legal evidence of the death of the party, to authorize the proceeding.

Judgment affirmed.

No. 8.—JOHN H. WYLEY, plaintiff in error, vs. JOHN R. STANFORD, defendant in error.

- [1.] The Court is not bound to give in charge, a request not warranted by the evidence.
- [2.] The dismissal of a levy made on realty of the principal, by the plaintiff, in *fi. fa.* does not prejudice the surety to the *fi. fa.*, and therefore does not discharge him.
- [3.] The Court told the jury, that the evidence on a particular point, was such, that it was impossible to come to any correct conclusion on the point.

Held, That this was not the expression, or the intimation of the opinion of the Court, as to what had, or had not, been proved on the point.

Illegality, in Habersham Superior Court. Tried before Judge JACKSON, at October Term, 1856.

Hyatt, McBurney & Co., recovered judgment in Habersham Superior Court, against Thompson Allan and John H. Wyley, principals, and Robert Allan security, for the sum of eight hundred and fifty-four dollars and ten cents principal, besides interest and cost of suit. This judgment was signed 10th April, 1854, and a *fi. fa.* issued the same day, which was levied on a lot of land as the property of Wyley, who filed his affidavit of illegality on the ground:

1st. That there had been a prior levy on a house and lot belonging to Thompson Allan, not accounted for.

2d. Because deponent, although ostensibly a principal in the *fi. fa.*, is in fact only a security, and that plaintiffs have extended such indulgence to Thompson Allan, the real principal, as operates a discharge of deponent's liability.

3d. Because said *fi. fa.* has been fully paid off and discharged.

Upon the trial, defendant Wyley, read the answers of *James P. Simmons* to interrogatories, who testified, that he sold to Thompson Allan the house and lot in the village of Lawrenceville, which had been levied on by virtue of the *fi. fa.* in favor of Hyatt, McBurney & Co., and conveyed to him the

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fee simple title thereto, and does not know of any other claim or title to said lot, than his own, at the time he sold it; that he traded one of the notes which was given for the purchase money to Robert B. Camp; that the present value of the house and lot is about fifteen hundred dollars. He has been of opinion that Allan was good for his debts, up to the time he assigned his property to John R. Stanford, which was done some time last fall, of this, however, he knows but little, except from report. Allan had in his possession at the time of his assignment, the house and lot, with a fair stock of goods, (the latter held by the firm of Allan & Stanford,) an old negro woman, a horse and buggy, a tract of some sixty acres of land, near Lawrenceville, household and kitchen furniture, &c., with doubtless other property, that witness cannot think of; a part of the purchase money for the house and lot, and for the land, has not yet been paid. Up to the time of the assignment, he was of opinion, that a debt of the amount of said *f. fa.* might have been made out of Allan, but has since learned facts not then known, as to the title to some of the property, and of liens, which render it doubtful whether such debt could have been collected by law then, but believes it could have been. He sold said house and lot to Allan, for seven hundred dollars, but it has been much improved by Allan since; considered him good for his debts up to the time of the assignment referred to, but has since learned that he was then insolvent. Does not know how long he has been insolvent.

Robert B. Camp, testifies, that when said house and lot was levied on, he filed his claim, which he expected to sustain upon the ground of a vendor's lien, having purchased one of the notes given for the purchase money. The note was renewed, and dated the 1st of January, 1883, due twelve months after date, signed by Thompson Allan, and John R. Stanford security, and upon which suit was instituted to the December Term last, of the Superior Court. Suit is still pending.

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Allan paid fourteen dollars and twenty cents, 31st December, 1853, and six dollars and twenty cents, 1st January, 1855.

Augustus C. Wyley, in answer to interrogatories, testifies: That he was the clerk of Hyatt, McBurney & Co., and their agent to collect and settle the original indebtedness of Allan and John H. Wyley. He settled the same by dividing the demand into two notes of equal amount, and required of Thompson Allan a good security to one of the notes, and of John H. Wyley a good security to the other. Thompson Allan gave for his security his brother Robert Allan; John H. Wyley gave for his security his father James R. Wyley. These notes were dated 31st March, 1853, and payable twelve months after date, with interest from date. Gave time, in order to get the debt secured beyond a doubt. Thompson Allan pledged his word at the time of the settlement, that he would pay every dollar of the note to which Robert Allan was security, out of his individual means, and said he thought he would be able to pay it before the twelve months, given in the note, was out. John H. Wyley said the same thing, in regard to the note to which James R. Wyley was security. John H. paid all his part of said debt to plaintiff. Allan paid six hundred dollars toward his part, on the 28th September, 1854, and promised to pay the balance in a few days. I granted indulgence to him for the balance, simply because he was at that time associated with John R. Stanford in the mercantile business; Stanford being an old customer of the plaintiff.

Shortly after this, witness returned to Charleston with the *f. fa.*, and delivered it to plaintiffs, who retained it until about the 1st of November, 1855, when witness starting out on a collecting tour, carried the *f. fa.* with him.

The debt could have been made out of Allan at any time within the last two years, if the plaintiffs had seen proper to have handed the *f. fa.* to the Sheriff of the county where he resided.

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To the fourth interrogatory, he answers: That it was a special agreement between himself as the agent of plaintiffs, and John H. Wyley and Thompson Allan, that Wyley should out of his individual means, pay one-half of the original indebtedness, and that Allan should pay one-half out of his individual means. Wyley agreeing to pay the note to which his father was security, and Allan agreeing to pay the note to which Robert Allan was security: required both defendants to sign both notes as principals, so that in case of failure to realize the money on either of the notes, from the defendant agreeing to pay the same, the plaintiffs might proceed to make the money directly out of the other defendant. It was, however understood, that Thompson Allan and James R. Wyley were securities for John H. Wyley, and that John H. Wyley and Robert Allan were securities for Thompson Allan,

To the fifth interrogatory, he answers: That Thompson Allan paid six hundred dollars on the *fi. fa.*, 28th September, 1854, and promised to pay the balance in a few days.

To the sixth interrogatory, he answers: That the whole amount due on the *fi. fa.* has been paid; six hundred dollars was paid by Thompson Allan, the balance was paid by John R. Stanford, 23d November, 1855.

To the seventh interrogatory, witness answers: That Thompson Allan always acknowledged this as his own individual debt.

To the first cross interrogatory, witness says: John H. Wyley and Thompson Allan, composed the firm of John H. Wyley & Co. The original debt, of which the *fi. fa.* is a part, was due from this firm, and was contracted in the year 1848. Plaintiffs always gave witness a *carte blanche*, to act according to the best of his judgment when transacting business for them.

To the third cross interrogatory: John H. Wyley is my brother.

To the fourth cross interrogatory: Witness took the *fi. fa.* out of the Sheriff's office of Habersham county, about the

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1st of June, 1854, and carried it to Lawrenceville, where Thompson Allan resided, and told him of his agreement at the time the note was given, and was willing for him to say what I should do with the *fi. fa.* He replied, that I was extending more kindness to him than he could have expected, and begged me as a personal favor to hold the *fi. fa.* until the last of August, and by that time he could certainly pay it off: said that he knew the debt had to be paid, and that he was the proper person to pay it. Witness yielded to his request, and retained the *fi. fa.* till he re-visited Lawrenceville in September, 1854, when Allan paid six hundred dollars as already stated, and promised to pay the balance in a few days. Directly after this, he returned to Charleston and delivered the *fi. fa.* to plaintiffs, in whose possession it remained till about the 1st of November, 1855, when witness carried it again to Lawrenceville. On the 20th November, 1855, Thompson Allan informed me that he and John R. Stanford had dissolved, and that Stanford was in possession of the assets: he told me, however, that the money could be made out of his property, as every thing he had owned for eighteen months or more, prior to their dissolution, was subject to this *fi. fa.* Witness handed the *fi. fa.* to N. L. Hutchins, attorney at law, and requested him to make the money on it. He assured me there was plenty of property which had belonged to Allan to bring the money at an early day.

To the fifth cross interrogatory, he answers: That plaintiffs, Hyatt, McBurney & Co. did give John R. Stanford an order on the Sheriff of Gwinnett county, for the *fi. fa.*, but as well as recollected, nothing was said about when it came into his hands. Plaintiffs had been informed by Stanford, that I had placed the *fi. fa.* in the hands of the Sheriff, with instructions to sell Allan's property right away. Plaintiff wrote to me to know if this was true; my answer was "it is a lie." This was about the 1st of July, 1854.

To the sixth cross interrogatory, witness says: I informed plaintiffs in July, 1854, that I had the *fi. fa.* still in my pos-

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session, and that Stanford's assertions to the contrary, were without foundation. I did not keep possession of the *fi. fa.* till it was ordered by me to be levied in Gwinnett, but on the contrary, I returned it to plaintiffs, who had it about a year, when I took it with me about 1st November, 1855.

To the seventh cross interrogatory, witness says: Allan owned, as he himself told me, a store house and lot with improvements thereon, which was subject to the *fi. fa.*, and on which it might have been levied, and the money made. Never heard anything about Stanford being security for Allan for the purchase money for said house and lot.

To the eighth cross interrogatory, answers: That it was his understanding, that after Wyley & Allan dissolved co-partnership, all the notes and accounts were left in Wyley's hands; the goods on hand and other property, were equally divided between them; and at the time the debt to plaintiffs was divided, and the two notes given, it appeared to the satisfaction of Allan and myself, that Wyley had paid over all money collected by him on the notes and accounts in his hands, to the creditors of the firm, and that the notes and accounts still uncollected were not sufficient to pay off all their liabilities, and it was for this reason, that their indebtedness to plaintiffs was arranged as it was, into two parts, Wyley agreeing to pay one part and Allan the other.

John R. Stanford who had control of the *fi. fa.* introduced the following letter from defendant Wyley, viz:

CLARKSVILLE, July 14, 1853.

T. ALLAN, Esq:

Dear Sir: The two notes we gave Hyatt, McBurney & Co. for over eight hundred dollars each, have been placed in Stanford's hands for collection, and for the purpose of collecting both notes off of me, and out of my individual means, (if I should have so much) and what seems strange to me is, that this should have been done at your suggestion, and request, for the purpose, as I am told, that you may save yourself. I

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am certain that I told you, that the assets of our business would never pay our debts, and this I had no idea you doubted for a moment; and I am sure that it never entered my head, that I was to make any preparation to meet the note that you gave, and I know that you intended to pay it out of your own means when you gave it, for you will recollect that you were desirous to have the payment put off as far as possible, as there were other demands against you, that had to be paid in the meantime. You certainly do recollect, that you stated, that you could pay your note, if you could get the time above stated, viz: to the 30th March, last. I feel confident, and am encouraged so to feel, from every act of your life, of which I have been cognizable, and from all our dealings, which have been considerable, that when you examine our books, papers and all our business, that you will be satisfied that our business cannot pay itself out of debt nor come within gun-shot of it; and when you are so convinced, I know you will not stand aloof and permit all the burden and weight of our mutual indebtedness to fall upon me, who have never, until very recently, heard a word of complaint from you, as to any of my conduct in our business. I can by a very short statement show you beyond a reasonable doubt, that it would be unreasonable to suppose our business could pay its own debts: We had invested in this business \$1,300 each, making \$2,600. We did business two years; at the end of these two years, our own accounts amounted to over \$3,000; when we dissolved partnership and divided the stock on hand, it amounted to \$3,000, or thereabouts; these two items taken together, make the sum of \$6,000 taken out of the business against \$2,600 put in, leaving us indebted to the business \$3,400. Now, it is not reasonable to suppose, that we made money so fast as to leave sufficient assets in the establishment to pay its debts, after abstracting so large an amount in so short a time, to say nothing of bad debts and expenses. This view of the matter, I feel assured, will convince you, that you have acted

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prematurely and without having sufficiently examined the business, in coming to the conclusion that I had appropriated the funds that should belong to us, to my own individual purposes—directly the reverse will be shown to be true, upon an investigation of all the business. I am sure that I have paid towards our debts more than I have ever collected from the debts due us. It would be idle for me to say that I have acted with much greater care and caution in our cash accounts, than I ever did with my own. I am sure that if you had been at my elbow I could not have acted with more fairness and uprightness than I have done; and I am now, not only willing, but anxious to pass the ordeal of an investigation of the whole business, by a committee of the most intelligent Masons and business men that can be produced; I care not who they may be, nor from what community they are selected, I shall not fear the result. If I shall prove to be in arrears with the concern, I shall promptly meet the odds that may be found against me, and our dealings and intercourse for the space of over twelve years, has furnished me with no cause or reason to doubt, that you will do likewise.

What I now have to ask is, that you come up and make a full and thorough investigation into the whole matter, that we may see how we stand, and that we may know and determine what to do, as something *must now* be done. I will be exceedingly glad if you will come as soon as practicable; if you can, come next week; write when you can come, that I may be sure to be at home, as I am occasionally absent, and might be when you come, if I were not advised as to the time when you were coming.

Yours, truly,

JOHN H. WYLEY.

The testimony being closed, counsel for John H. Wyley, requested the Court to charge the jury:

1st. That if they believe that Augustus C. Wyley as agent

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of Hyatt, McBurney & Co., made an arrangement that John H. Wyley & Robert Allan were sureties, although Wyley appears as principal, that fact makes him a surety *only*.

2d. That if in this case the jury believe that arrangements were made between the agent of plaintiffs and Allan by which Allan was given indulgence without the knowledge of Wyley, and by which Allan became less able to pay in the end, Wyley is discharged.

3d. That if the jury believe that all the assets of Allan went into the hands of Stanford at or near the time when Stanford became the owner of the *fi. fa.*, and that they were sufficient to pay the debt, it would be a fraud upon the rights of Wyley (if he was only a surety) to enforce the *fi. fa.*, and the same is in law satisfied.

4th. That when a party like Col. Stanford buys property, and has it transferred to himself, which is first liable to a judgment, and afterwards buys the *fi. fa.* to protect his transfer, he cannot afterwards go upon a party who is liable secondarily for the payment.

Which charges the Court refused to give, but charged the jury in substance as follows, viz :

That there were three grounds of illegality taken in this case :

1st. That the dismissal of the levy on the real estate of Allan in Lawrenceville, extinguished the debt as to Wyley. The Court charged that it did not.

2d. That the alleged transfer of certain property belonging to Allan, in Lawrenceville, to Stanford, extinguished the debt as to Wyley. Upon this point the Court charged, that there was something said about a mortgage and transfer, but there was such confusion about the matter; no legal evidence of what the mortgage was for; how much; upon what property; to secure what debt; that it was impossible for the Court and jury to come to any correct conclusion about it.

The 3d ground of illegality was that Wyley being only surety upon the note, the foundation of the *fi. fa.*, indulgence

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had been extended toward the principal, Allan, which relieved in law the security. Upon this head, the Court charged, that the defendant Wyley must show to them two things: first, that he was security only; and, second, that acts had been done by Hyatt, McBurney & Co., or Stanford, which increased his risk or injured him. And first, as to his being only security, the whole question would turn upon what construction they would put upon the testimony of A. C. Wyley.

The Court remarked, that the jury would observe, there was apparently some contradiction in his testimony, on the surface. If the witness meant that he required both Allan and Wyley to sign as principals, and to be principals as to Hyatt, McBurney & Co. while they would be only securities as to each other, then, while Wyley might be only security as to Allan, he still would be principal as to Hyatt, McBurney & Co. and Stanford, the transferee, who stood in their shoes; but if they believed the arrangement was, and the witness so meant to say, that Wyley, though signing the note as principal, was to be held as security, not only to Allan, and in reference to a future settlement between them, but also as to Hyatt, McBurney & Co., then he was security only to Stanford, the transferee, and being such security, if Stanford, or Hyatt, McBurney & Co. had indulged Allan, without the knowledge and consent of Wyley, or done any act without his knowledge or consent, which increased his risk, or injured him, the security was released and discharged from the debt. The Court put the whole case upon two points; first, whether Wyley was only security; and second, whether Stanford, or Hyatt, McBurney & Co. had indulged Allan so as to injure or increase the risk of Wyley.

The jury found for plaintiffs in the *fi. fa.*, and that the same was proceeding legally.

Whereupon, counsel for Wyley moved for a new trial, on the grounds, that the refusal of the Court to charge as requested, and the charge as given, were erroneous, and because the verdict was contrary to law, and against the evidence.

The Court overruled the motion for a new trial, and counsel for Wyley excepted.

PREPLES & HULL, for plaintiff in error.

JOHN R. STANFORD, *in propria persona*, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the Court below right in refusing a new trial?

That, of course, depends on whether any one of the grounds of the motion for a new trial was sufficient.

The first ground of that motion was, the refusal of the Court to give *the requests* in charge to the jury.

The first request was in substance, that, if an "arrangement" of the original debt was made by the agent of the holders of the debt, the effect was, to render John H. Wyley only a surety, although his name might appear as a principal.

[L.] Now the evidence as to this "arrangement" was such as to leave it doubtful, whether John H. Wyley was not to bear towards *the holders* of the debt the relation of *principal*, and not that of surety. See the answer of Augustus C. Wyley to the fourth direct interrogatory.

But if the evidence was such as to leave this doubtful, it is manifest, that for the Court to have told the jury as requested, that the arrangement, if made, would render Wyley *only* a surety, would have been wrong. What the Court ought to have done in such a case, it did: it called the attention of the jury to the character of the evidence, and left them to decide what the evidence proved. See the part of the charge relating to the third ground of illegality.

The second request went on the assumption, that there was something in the evidence to authorize the jury to believe, that some arrangement, i. e. of course, some *binding* arrangement, was made by the holders of the note, and one

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of the makers of it, Allan, by which Allan obtained indulgence on the note.

But, in truth, there was nothing in the evidence to authorize the jury to believe any such thing.

Besides, the request also tacitly assumes, that John C. Wyley was but a surety; and yet it was doubtful, as we have seen, whether he was not a principal.

A request to be good must have evidence to rest on.

As to the third request, there are two or three things to be said :

1st. The evidence hardly justifies a request, assuming that all the assets of Allan went into the hands of Stanford.

2d. But if it does, it does not show, that they may not have properly gone into his hands. It may be, therefore, that they went into his hands to satisfy some debt having *precedence* of this debt.

At least, it may be that they went into his hands to satisfy a debt of equal claim, or equity, with this. And if so, the effect ought not to be to "satisfy" this debt, unless at least, the assets were sufficient to satisfy both debts. And the evidence rather is, that the assets were not sufficient to satisfy both debts.

3d. It may well be doubted, whether in any case, the transfer could work a *satisfaction* of this debt *at law*. And the proceeding was at law, being an affidavit of illegality.

As to the fourth request, there is this to be said : first, it, like the rest, assumes that Wyley was only "secondarily" liable: secondly, the evidence does not show whether the property bought by Stanford, was "first liable" to the judgment or not. The evidence does not show what was the nature of the claim or right which Stanford had against Allan, from whom he got the property.

The next ground taken in the motion, was that the *charges* were erroneous.

The charge was in three parts. The first part was, that the

dismissal of the levy by the plaintiffs in the *fi. fa.* did not extinguish the debt.

The levy was one on real property. The dismissal of a levy on real property by the plaintiff in the *fi. fa.* does not extinguish the debt. Authority is not needed to establish this.

[2.] It is equally manifest, that the dismissal of such a levy, although it be on the property of the principal, cannot hurt the surety, for the lien of the judgment on the property remains unaffected, and the property being realty, cannot be removed, and the lien of the judgment is one to which the surety becomes entitled, the moment he pays the debt. 2d section of Act of 1831, amendatory of an Act to define the liability of sureties. *Cobb's Dig.* 595.

The first part of the charge, then, was not erroneous.

[3.] The second part of the charge, was objected to, as being obnoxious to these words of the Act of 1850, to prevent Judges from making "certain charges," &c., viz: "It shall not be lawful for any or either of the Judges of the several Superior Courts of this State, in any Court whether civil or criminal, or in equity, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved. *Cobb's Dig.* 452.

But we do not find that it is. It is very certain that the Court in this part of the charge does not say that one thing or another has been *proved* or *not proved*.

The same remark may be made as to the observation of the Court, uttered "during the progress" of the trial, and at the time when it was deciding a motion to dismiss the illegality, especially as the observation was called out by the nature of the motion, and the motion was a motion made by the party excepting to the observation.

And it is equally true, that this objection does not lie to the third part of the charge; and this was the only objection urged against that part of the charge.

The Court told the jury, that the testimony of Wyley, on a particular point, was open to two constructions; and what

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they were; but it did not tell them which to take. What the Court told them was true, and it did not amount to the expression, or the intimation of the Court's opinion, as to which of the two constructions was the true one.

Upon the whole, we find no error in the charge.

Nor do we think that the verdict was contrary to the evidence.

The result therefore is, that the judgment of the Court, refusing a new trial, must be affirmed.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT SAVANNAH,
JUNE TERM, 1857.

*Present—CHARLES J. McDONALD, } Judges.
HENRY L. BENNING, }

No. 1.—JAMES A. LYON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error. 160/53

[1.] The admissions of a defendant, not on his trial, are inadmissible on the trial of the party, jointly indicted with him.

[2.] If a request to charge the jury, though sound as a legal principle, is not applicable to the proofs of the case, it is no error in the Court to refuse to charge it in the words of the request.

Indictment for an assault with intent to murder, in Washington Superior Court. Tried before Judge HOLT, at March Term, 1857.

Robert Cox and James A. Lyon, were jointly indicted for an assault with intent to murder Alexander G. Lawson. Cox failed to appear, and Lyon only was put on trial.

In the course of the trial, defendant's counsel proposed to

* Judge LUMPKIN was absent during this Term of the Court, on account of indisposition.

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ask two witnesses, one introduced on the part of the State, and the other on the part of the prisoner, "whether or not they had heard Cox acknowledge that he had shot the prosecutor Lawson, at the time and place charged in the indictment." The Court excluded the testimony on the ground that said acknowledgments were not legal evidence in behalf of defendant Lyon.

To which counsel for prisoner excepted.

After the conclusion of the testimony, the counsel for prisoner requested the Court in writing, to charge the jury, "that an actual assault by the person killed upon the person killing, may reduce the offence to the grade of manslaughter."

Which charge the Court refused to give in the language requested, and counsel excepted.

The jury found the defendant guilty: whereupon his counsel moved a rule for a new trial, which the Court refused, and counsel excepted.

H. WILLIAMS, and F. S. BARTOW, representing JENKINS, for plaintiff in error.

McLAW, Attorney General, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The Court properly rejected the admission of Cox, that "it was he who had shot the prosecutor at the time and place stated in the bill of indictment." There is no sound principle upon which it can be admitted. Though jointly indicted with the defendant on trial, he was not on his trial. This Court has held that a witness jointly indicted with a defendant on his trial is competent, if he be not also on his trial: *Jones vs. The State*, 1 *Kelly* 610. In that case, the parties had severed on the trial. The witness was not a party to the issue to be tried, and upon that ground he was considered competent. Cox is not a party to the issue here, and being a

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competent witness, his admissions ought not to have been received. But it is not on that account alone that his admissions ought to have been rejected. He was jointly indicted, and to have admitted his declarations to acquit his accomplice, would be recognizing a principle, which would, in all such cases, subvert the ends of justice. All one defendant would have to do, would be to admit that his guilty accomplice was innocent, and that he himself had perpetrated the crime, absent himself so as to enable the party on his trial, to have the benefit of his admission, and after his acquittal, appear, demand his trial and prove by the evidence of the acquitted party, that he was in fact the guilty person. It is true that the jury might justly entertain strong suspicion of testimony given under these circumstances, and perhaps, without corroboration, discard it entirely, as they ought to do; but if corroborated by circumstances too slight, standing alone, to have much influence on their judgment, they might give credence to it. But the other ground is sufficient. According to the decision of this Court, his admissions were no more receivable as evidence, than the admissions of any other witness. It is true, that if the defendants had been tried together, the evidence ought to have been admitted, but not as testimony in favor of the other defendant, but as proof of the guilt of Cox.

It was no reason for the admission of the testimony offered by the defendant, that the State had given the sayings of Cox in evidence. If counsel for the defendant thought proper to allow them to be given without objection, it is no reason for admitting them, if illegal, when offered by the defendant, and objected to by the Attorney General.

[1.] We think there was no error in the refusal of the Court to give the charge as requested. The request was simply an abstract principle of law, proper or not, according to the proof in the case in which the request was made. In this case, the defendant was a trespasser on the prosecutor's premises, at a late hour of the night. He carried deadly wea-

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pons with him, which it was unlawful for him to carry, and the evidence shows he was quite ready to use them. He knew he had no right on the premises, and supposed that the owner, if he found him there, would probably attempt to drive him off, and went prepared to take his life if he did. No assault that could have been made upon him by the prosecutor, short of an attempt to take the life of the intruder, or made in a manner to induce the apprehension that such was the intention, could have reduced the killing, if he had killed the owner, from murder to manslaughter. His going armed with a loaded pistol—prepared to meet any emergency, is evidence of malice. If it was a contrivance to get the prosecutor to assault him that he might take his life, it would have been murder, if he had killed him. If he went there to defy all resistance of his purpose, the prosecutor might have been justified, not only in assaulting, but killing him. It is not necessary to extend remarks on the subject. It might be improper to do it. It is sufficient to say, that there was no error in the refusal of the Court below to give the charge as requested, and that the judgment must be affirmed.

Judgment affirmed.

No. 2.—JAMES M. REINHART, plaintiff in error, vs. JOHN MILLER, defendant in error.

- [1.] If an instrument offered in evidence is objected to on account of interlineations, what the interlineations were, should appear in the record; but they are not an objection to admitting the instrument in evidence. The jury must decide upon them.
- [2.] When a party present, and an instrument is presented for his signature, directs another to sign it, no written authority is necessary, and if the instrument is signed and the parties immediately recognize it by acting upon it, no

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proof of the presence of the party when the instrument is signed need be made.

- [2.] As between the parties to a marriage contract, it is valid, although it be not recorded.
- [4.] A deed may be admitted in evidence, even if it be not recorded; but proof of its execution must be made.
- [5.] No ratification of a deed necessary, when the person who signs it, is directed to do so by the party to be bound, at the time it is presented for signature, and it is immediately signed, although the party steps out of the immediate presence of the person directing it.
- [6.] *All* sealed instruments do not require the attestation of two witnesses.
- [7.] Attested instruments, may, under circumstances, be proven otherwise than by the subscribing witnesses.
- [8.] An instrument signed by a stranger is good, if he was directed by the party to execute it, and he immediately does so, although the subscribing witness know nothing of the direction so given.
- [9.] Hearsay evidence inadmissible.
- [10.] Reference to the evidence given in the case made by the presiding Judge, in deciding a point raised by counsel in the progress of a cause, is not error.
- [11.] When the decision of the Court in refusing a continuance is excepted to, the grounds of the motion must be stated.

Trover, in Montgomery Superior Court. Tried before Judge FLEMING, at March Term, 1857.

This was an action of trover, brought by James M. Reinhart, against John Miller, for the recovery of three negroes, which he claimed by virtue of his intermarriage with Cassa Miller, to whom they belonged.

Plaintiff proved, that the negroes belonged to Cassa Miller, his late wife, prior to their intermarriage. Proved the marriage and her death; the value of the negroes—demand and conversion; and closed his case.

Defendant held the negroes as trustee under a marriage settlement which he alleged was executed between the plaintiff and said Cassa Miller, prior to, and in contemplation of their marriage, and by the terms of which, said property, if she died, leaving no children, was to go to her brothers and sisters.

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Defendant offered in evidence the depositions of the following witnesses as preliminary to, and laying the foundation for, the introduction of the marriage settlement, to-wit :

Julia Ann Gay : Knows the parties—did not see the contract executed or signed by Reinhart, Cassa Miller or John Miller. Did not witness it, was not present when the contract was signed, did not read the contract, knows not whether Reinhart was satisfied or not, *John Miller just previous to the marriage came to the door, his sister was inside dressing, requested her to sign her name to the contract. She authorized him in my presence to sign her name to it for her.* There were on the premises at the time of the marriage, Nathaniel Gay, Laura Gay, Lewis Beacham, Elisha Wilkes and wife, Missouri Gay, Susan Bridges, now Susan Curry, and Alexander M. Wright.

To the *Cross Interrogatories*, she answers: I did not see the contract executed, nor do I know when it was done. I did not read the contract or hear it read. I did not see Cassa Miller sign her name to the contract, but she told her brother John to do it for her—she could write her name. I do not know when the contract was made or where it was signed, or whether signed by Reinhart at all. Do not know whether Alexander Wright signed the contract or not. I did not sign it, nor did I see any person do so. Beacham married them; John Miller went after him and came with him; does not know who wrote the contract, John Miller had it in possession after it was signed. Cassa Miller seemed the most anxious to have it signed, and said she would not marry him unless he did sign it, and said she expected he would not sign it, it was so very tight, and if he did not sign it there would be no marriage between him and her that day. John Miller did not urge her to sign the contract, but she authorized her brother to sign the contract. I did not see any signing done that day. Knows nothing, &c.

Laura Gay's deposition: I saw a contract before Cassa Miller and James M. Reinhart were married, the contract

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annexed looks to be the same. I did not witness it or see any one do so. I do not know whether Reinhart was satisfied or not, did not hear him express himself. I did not see it executed nor did I hear it read.

Cross Interrogatories.—I know nothing about the contract, only there was a contract before marriage, but where executed and witnessed I am unable to say. She, Cassa Miller, could write her name but did not do so. I heard her tell her brother John Miller to sign her name to the contract, and her reasons for telling him to do so, was, she was dressing. Knows not who signed or in what part of Gay's premises the contract was made, don't know whether Alexander Wright signed as witness or not; did not sign herself, nor does she know who were parties or witnesses. Lewis Beacham married them. John Miller went after him and returned with him,—does not know who wrote the contract. Saw John Miller have it. Saw no anxiety to have it signed, nor did I see any urging, it all seemed voluntary.

Nathaniel Gay's deposition: I saw the contract executed, and signed by the said James M. Reinhart, John Miller, and John Miller signed his sister Cassa's name. I subscribed the same and was present when Lewis Beacham, James M. Reinhart and John Miller signed their names. I cannot write, and authorized John Miller to write my name to it. I made my mark. Lewis Beacham read a portion of the contract and handed it to John Miller who read the balance, it was then handed to James M. Reinhart who had it sometime, and appeared satisfied with its contents, and expressed himself so, and said he did not care for the property, it was not what he wanted. Had property enough of his own. He signed it voluntarily. There was no compulsion and the contract was executed previous to the marriage ceremony.

Cross Interrogatories.—I saw a marriage contract executed and believe the annexed to be the same. It was executed at my house in Laurens County, Ga., on or about the 6th day of February, 1853. Lewis Beacham read a portion (and

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repeats the answer to the direct interrogatory about reading and handing to Reinhart.) Myself, Lewis Beacham, J. M. Reinhart and John Miller were present outside of the fence and Alexander M. Wright was in the door yard about two or three yards from us. Cassa did not sign her name, John signed for her. Does not know whether she could write or not. It was signed outside of the yard on a gate post about 25 or 30 yards from the house, and Lewis Beacham, James M. Reinhart, John Miller and myself out side of the yard, and Alexander M. Wright inside of the yard. If he came outside of the yard I did not see him. He did not sign the contract. I signed it and so did Lewis Beacham as witnesses. If Wright signed it I did not see it, nor do I believe it was done at my house. Beacham and myself signed as witnesses, Reinhart, Cassa Miller and John Miller as parties. Lewis Beacham married Reinhart and Cassa, and John Miller went after him. I do not know who wrote the contract. John Miller had it in possession as well as James M. Reinhart and Lewis Beacham at the time it was signed; and after Reinhart signed it with the others, he handed it to John Miller. I saw no anxiety to have it signed and no urging about it. It all appeared voluntary. I did not see Cassa sign her name. John Miller did so for her. It was at my house in Laurens County about the 6th February, 1853. James M. Reinhart, Beacham, Miller and myself were outside and Wright inside of the fence.

Lewis Beacham's deposition.—I saw James M. Reinhart sign the contract, also John Miller, and John Miller signed his sister's name. I subscribed the same as witness, and was present when it was signed. I think the contract hereto annexed to be the same, or at least I believe so. I read a portion of it, handed it to John Miller who read the balance. The contents to the best of my belief are the same. Reinhart appeared satisfied, and was the first who signed it. If he had any objections, he did not express them in my presence. He signed it voluntarily. The contract was execu-

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ted before marriage. I believe the signature is mine. If there have been any alterations in the contract I cannot perceive it. It reads to me the same as heretofore; and I believe the marriage contract here annexed, to be the same that I signed.

Cross Interrogatories: I saw a marriage contract executed between Reinhart, Cassa Miller and John Miller, as trustee, at the house of Nathaniel Gay, in Laurens County, Georgia. I read a portion of the contract, found some words I could not make out, and handed it to John Miller who read the balance in the presence of, as far as I can recollect, John Miller, Reinhart, Wright and myself; Cassa Miller was not present when the contract was signed. Is unable to say whether she could write her name. The contract was signed outside of Gay's fence which encloses his house, thirty yards more or less from the house. It was signed by Reinhart first, I saw him sign it in the presence of Wright, Miller and myself. I have no recollection of any other person being present, though there might have been. I will not swear positively that Wright did sign said contract but to the best of my recollection he did so. I saw Reinhart and John Miller sign their own names, and John Miller sign his sister's name as parties, and I as witness. I believe the contract to be the same, and that Wright signed as a witness, but I may be mistaken. I performed the marriage ceremony, John Miller came for me. I do not know who wrote the contract, I think Miller showed it to me. It was executed and handed back to him. It was signed by Reinhart voluntarily. There was no anxiety or urging manifested. Cassa Miller was not present. I left all parties apparently friendly and satisfied. Cassa did not sign her name in my presence. I have stated where it was, and it was about the 1st of February, 1853.

Defendant then proposed to introduce the following marriage contract, viz :

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STATE OF GEORGIA, } This Indenture of three parts,
 Montgomery County. } made and entered into, this February
 the 5th day, in the year of our Lord, eighteen hundred
 and fifty-three, between James M. Reinhart of said State and
 county of the first part, Cassa Miller of said State and coun-
 ty of the second part, and John Miller of said State and
 county of the third part, witnesseth, that the said James M.
 Reinhart of the first part, for and in consideration of marriage
 to be had and solemnized between the said James M. Reinhart
 of the first part, and the said Cassa Miller of the second part,
 does for himself, heirs, executors and administrators, covenant,
 grant and agree that all the lands that may be given her, the
 rights, members and appurtenances to said lands, and three
 negroes to-wit: Georgiana, a girl about sixteen years of age,
 Amy a girl, about four years of age; Milly, a girl two years
 of age, now in the possession of Cassa Miller, and all other
 property which may at any time be given said Cassa Miller
 by her father or other persons, by will or otherwise, shall
 form and remain to be her separate property, and estate;
 and shall not in Law or equity be subject to the use
 of James M. Reinhart; and at her death, if leaving no chil-
 dren, to go to her brothers and sisters and in nowise to be
 subject to the payment of the debts of the said James M.
 Reinhart, or be subject to be sold or conveyed, or in any man-
 ner controlled by him the said James M. Reinhart; but the
 rights and title of said property shall be *vested* in said
 John Miller of the third part for the use and benefit
 of said Cassa Miller; and said James M. Reinhart further
 covenants and agrees that said Cassa Miller may dispose of
 said property by will to any person she may appoint, subject
 however to be used by said James M. Reinhart with the ap-
 probation and consent of said John Miller, during the con-
 tinuance of the coverture, for the mutual benefit and advan-
 tage of said James M. Reinhart and Cassa Miller. And the
 said James M. Reinhart and Cassa Miller, nominate and
 appoint said John Miller trustee of said property, who

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is authorized to possess himself of and control said property in conformity with this indenture, and the said John Miller consents and agrees to his said nomination and appointment of trustee as aforesaid.

In testimony whereof, the parties of the first, second and third parts have hereunto set their hands and affixed their seals, the day and year above written.

J. M. REINHART, [L. S.]

CASSA MILLER, [L. S.]

JOHN MILLER, Jr. [L. S.]

Signed, sealed and delivered in the presence of
his

NATHANIEL ✕ GAY,
mark.

LEWIS BEACHAM, J. P.

CLERK'S OFFICE, Montgomery County.

The within agreement or contract, recorded in Book, P. P. on Folios 80 and 81, this November 23d day, 1854.

To the admission of which contract in evidence, plaintiff objects upon the following grounds:

1st. That there were interlineations apparent upon its face, and defendant must explain them before he can have the use of the deed in evidence.

2d. That as it was apparent from the deed and the admissions of defendant, that John Miller had signed his sister's name, the defendant could not introduce the contract, (a written and sealed instrument,) in evidence, until he had first proven that Miller had been authorized by his sister to sign her name to the contract, which authority, if she was not present at the time of executing the contract, must be shown by a writing under hand and seal.

And 3d. That the contract had not been recorded in the county of the husband's residence, as is by statute required.

All of which grounds were overruled and the instrument was admitted.

Defendant here closed.

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Plaintiff offered in rebuttal, the depositions of *Green T. Kellam*, who *knows* the parties, asked Miller who wrote the contract, said he did from Cobb's Forms. Boarded at the house of John and Cassa Miller's father about five months. Knows the negroes. They were claimed by Mrs. Cassa Reinhart. They were in the possession of James M. Reinhart. The negro woman Georgiana worked on his farm. If the bill of sale to said negro was in possession of Reinhart, Miller said he would have to give it up to him, and Reinhart did give it up rather than have a difficulty. I heard John Miller, Sr., say that he had given said negro to Mrs. Reinhart.

Cross Interrogatories: Did live at the house of Miller, Sen.; Miller, Jr., resided there. His property was there so far as I know. It was his house. He superintended the hands of his father. I did not know the negro Georgiana to work on any other than Reinhart's farm. I knew the hands of Miller, Sr. to work sometimes on Reinhart's farm. The other negro woman of Miller, Sen. did wait on Mrs. Reinhart. I never knew Reinhart to say he did not claim title to said negroes.

Lewis Beacham, sworn, says: The contract was signed outside of the yard, twenty-five or thirty yards from the house, never saw Cassa Miller till she came into the house to be married. She was not present at the signing, nor did witness hear her give John Miller any authority to sign her name for her, saw Reinhart sign and signed himself as a witness. To the best of witnesses' belief and recollection, Wright was present when the contract was signed, and was a subscribing witness. Wright asked some question about the seal to Reinhart's name. Did not recollect whether Gay was present; but it seemed reasonable that if Gay had been present, witness could not have forgotten it, as he (witness) and Gay were not on speaking terms with each other; had no recollection of seeing Gay till he stepped in at the back door towards the kitchen, which was after the instrument had been signed, and the witness had gone to and taken his seat

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in the house. If Gay's name had been on the instrument at the time of witness signing it, witness thought he ought to have recollected it. He might have signed, but if so witness does not recollect it. John Miller with John Currie came to witness' house after Mrs. Reinhart's death, and asked witness if he remembered who were the subscribing witnesses to the contract. Witness answered Wright and myself. Miller replied no, you are mistaken, dont you remember it was Gay and yourself? Witness answered no, I do not so recollect. The interrogatories were executed in Miller's house. He was requested by commissioners to leave the room before any questions were answered. Doors of the room where commissioners were situated were not closed. Miller had no conversation with witness.

Cross-Examined.—The signature to the marriage contract offered in evidence by defendant, looked like witness,' but he could not say it was or it was not. Said he would not deny it; when asked if he *believed* it to be his signature, he said *it looked* like his, and he could not deny it. (Did not know that Cassa was on the plantation at the time of signing the contract.) He said in a few minutes after signing said contract as aforesaid, he went into the house and performed the marriage ceremony for said James M. and Cassa.

Arthur Davis sworn, on the opening of the case by the plaintiff, answered to the cross examination, that he heard Reinhart say there was a marriage contract between himself and his wife.

Here the testimony closed on both sides; and after argument of counsel, the court was by plaintiffs requested to charge, *inter alia*:

1st. That defendant cannot hold under the marriage contract, if it was not recorded in the county of the husband's residence, in compliance with the statute.

2d. That a deed conveying real estate must be recorded before it can be properly admitted in evidence.

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3d. That "where the act of the agent was by deed the ratification also must in general be by deed."

4th. That all sealed instruments must be signed, sealed and delivered in the presence of two witnesses; and that if neither of the attesting witnesses heard Cassa Miller authorize John Miller to sign the contract for her, and that if in that case its execution has not been proved to be in her presence, nor to have been where she could see it at the time it was executed, it is not a case of constructive presence.

5th. That this instrument should have been signed by all the parties thereto in the presence of the attesting witnesses, or that the witnesses should have heard the authority given to others by the parties to sign for them. And

6th. That to be a constructive presence, Cassa Miller must have been in view of the parties and witnesses at the time of the execution of the instrument, and the witnesses must have heard the authority given for the signing.

All of which requests to charge, his Honor, Judge FLEMING, refused; and instead thereof did charge, *inter alia* :

1st. That others than the subscribing witnesses to a deed, may prove the authority given to a third party for its execution.

2d. That the authority given by one to another to sign a deed may be proved by others than the attesting witnesses to the deed.

3d. That it was not necessary for Cassa Miller, after authorizing her brother to sign her name to the contract, to be herself in view of the other parties and witnesses; nor for the attesting witness to hear the authority given; nor for her to have seen the signing. And

4th. That it was not necessary, under the peculiar circumstances of this case as disclosed by the testimony, for John Miller's authority to sign his sister's name to be in writing, or to have been given in the hearing of the subscribing witnesses.

Whereupon the cause was submitted to the jury, and a verdict found for defendant.

And counsel for plaintiff now moves for a new trial, on the following grounds, to wit:

1st. That his Honor, Judge FLEMING, erred in the several charges and refusals to charge above stated.

2d. That he erred in admitting said marriage contract in evidence, without having the party introducing it to explain the interlineations apparent upon its face; and in holding that the law presumed the interlineations to have been made before the execution of the deed, and that it was incumbent on the party attacking the deed to show the contrary.

3d. That he erred in refusing to admit the testimony of Charles L. Holmes, who was offered to prove that he had had a conversation with Alexander M. Wright, now deceased, shortly after the marriage of Mr. Reinhart and Miss Miller, and before the commencement of any suits, for the property embraced in said contract, and that Wright told him he was a subscribing witness to the contract.

4th. That his Honor erred in stating in the hearing of the jury, that if it was proven that Cassa came to the door while dressing and told her brother to sign for her, it was a *sufficient presence*; and that as it was in evidence, that she had said she would not marry plaintiff unless he signed the instrument, and it being admitted that they did marry, it raised a *strong presumption that the contract was executed before marriage*; because these were questions of fact, and should have been left to the finding of the Jury without any expression of opinion from his Honor, as to what had or had not been proven.

5th. That his Honor erred in refusing plaintiff's motion for a continuance, sought on the imperfect execution of interrogatories, if he did so, on the ground that the exceptions to the sufficiency of the answers and to the manner of executing the interrogatories, came too late; as plaintiff not hav-

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ing introduced, or offered to introduce, any testimony, and not having opened his case to the jury, did not consider the case before them.

6th. That the verdict is contrary to evidence, and to the principles of justice and equity.

The Court overruled the motion for a new trial, and plaintiff excepted.

Y. J. ANDERSON, for plaintiff in error.

W. B. GAULDEN, for defendant in error.

By the Court.—MCDONALD, J. delivering the opinion.

This bill of exceptions throws upon this Court, pressed as it is for time, and oppressed by labor, to look through the entire record, to search out the errors complained of, when according to the statute, the errors should be plainly and distinctly set forth; and I will add, according to my construction of the Act, should be as methodically set forth as they formerly were in the assignment of errors, which is now done away.

The first exceptions apparent in this record are, that there were interlineations apparent upon the face of the marriage contract offered in evidence, and on that account the defendant objected to reading it in evidence until they were explained.

2d. That there was no writing, under hand and seal, to Miller from his sister authorizing him to execute the contract, and it was not done in her presence.

3d. That the contract was not recorded in the county of the husband's residence.

[1.] The decision of the Court overruling these objections to the evidence is excepted to.

In regard to the first, the nature of the interlineations does not appear in the record, whether they altered the instrument in a material part or not. That was a matter, however, to be

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referred to the jury, and whether the alterations were made since the execution of the instrument, and whether they found contrary to evidence in that respect, we cannot tell, as the interlineations may have been of such a description, that there was no temptation to the party to make them.

[2.] John Miller signed his sister's name to the contract. It is not signed as agent.

A stranger may seal a deed, "by the allowance or commandment precedent, or agreement subsequent, of him that is to seal it, before the delivery of it, and it is as well as if the party did seal it himself." 1 *Shep. Touch.* 57. The evidence was express as to the "commandment precedent to the delivery" by the party who was to sign it. Her brother went to the door of the room where Cassa Miller was dressing, and requested her to sign the contract. He must have had it with him. She authorized him to sign her name. It was signed near the yard on the gate-post and under circumstances which warranted the Court to submit the contract and the evidence to the jury.

[3.] The Act in regard to recording marriage settlements was intended for the exclusive benefit of *bona fide* purchasers and creditors. The instrument is valid between the parties. For the reason already assigned, the first request of plaintiff ought not to have been given in charge to the jury.

[4.] There was no ground for the second request. This was an action of trover for the recovery of negroes. The deed was good without a witness for the personalty. It was also admissible in evidence, whether recorded or not, if the execution was proven.

[5.] There was no occasion for a ratification in this case, of any sort, under the view we have taken of it. It was Cassa Miller's own act, performed by her brother, by her command. But had a ratification been necessary, it was ratified by the act of the party. The instrument was proven to have been executed. Cassa Miller had declared that she would not marry Reinhart until he did execute it. She did mar-

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ry him. From these facts it must be inferred that the deed had been executed before the marriage, and that she knew it.

[6.] There is no authority for saying that all sealed instruments must be signed, sealed and delivered in the presence of two witnesses. It is true in regard to conveyances of land and donations of slaves under our statutes and judicial decisions, but it does not go beyond.

[7.] In this case negroes alone were the subject of litigation, but if the land also had been in controversy, there was no necessity for further proof to send the contract to the jury. If the subscribing witness to an instrument denies or forgets his attestation, circumstances may be resorted to for proof of its execution. 4 *Wendell* 282; *Jackson vs. Christman* 8; *The King vs. The inhabitants of Longor*, 4 *Barn. & Adol.* 647. The attesting witnesses to the marriage contract differ in their testimony in this case in regard to the attestation. One of the witnesses could not write. He testifies that Alexander M. Wright, when the contract was executed, was two or three yards from them, in the door yard, and that he did not sign it.

Lewis]Beacham, the other witness, could write, and testifies to the execution of the instrument and to his own signature, and to the contents, but yet says that he believes Wright was a subscribing witness, but may be mistaken. He does not even recollect that Gay was present or a witness, nor does he remember that his name was to the contract when he signed; and still Gay's name is directly above his on the instrument, and Wright's name does not appear. The evidence of Davis, in this state of things, that he had heard the plaintiff say that he had a marriage contract with his wife, was entitled to great consideration as evidence of its due execution.

[8.] Whether the witnesses knew of the authority of, or direction to Miller to sign, has nothing to do with the validity of the contract. If he was directed to sign it, and signed agreeably to the direction, in such manner as to make his

signing a valid execution of it, it was sufficient. But these things should, of course, have been made out on the trial, by either direct or circumstantial proof, and the circumstances testified to by the witnesses were before the jury.

[9.] The proof proposed to be made by Charles L. Holmes, was hearsay evidence. What Wright said could not affect the interest of either party.

[10.] What the presiding Judge stated in the hearing of the jury, and which is set forth in the fourth ground of the motion for a new trial, was said necessarily in deciding a motion made by counsel to reject the marriage contract as evidence, on the ground that its execution had not been proven.

The fifth ground of the motion for a new trial, was overruled by the Court below, because it did not truly state the ground of the decision. The motion for a continuance, and the grounds on which it was made are not set forth in the record. It is a conditional exception.

We think that the verdict of the jury was warranted by the evidence, the equity and justice of the case, and that the judgment of the Court below must therefore be affirmed.

Judgment affirmed.

No. 3.—WILLIAM ADAMS, plaintiff in error, vs. THE GOVERNOR OF THE STATE OF GEORGIA, defendant in error.

[1.] A recognizance of bail in a criminal case may be good, although it does not contain a recital that the principal was arrested, that he was examined, that he was "convicted" on that examination, and that an order for bail was made.

[2.] James Adams assaulted Robert Frank, and cut him with a knife; Adams then entered into a recognizance containing a condition to appear at the next

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(proper) Court, "to answer such matters as" should "be then and there charged against him by Robert Frank, concerning an assault and battery committed by him, the said James Adams, on the said Robert Frank, and not thence depart without leave of the Court." Afterwards, Frank died of the cutting. An indictment for *murder* was found against Adams. He failed to appear.

Held, That the condition of the recognizance was broken.

[3.] In a recognizance of bail in a criminal case, the omission of a statement that the offence was committed in the State, does not *per se*, render the recognizance void.

[4.] The charge of the Court is to be taken in reference to the subject to which it relates.

[5.] If at the time a Justice of the Peace admits an assailant to bail, the assailed party is still alive, and the Justice, believing the offence not to amount to more than an assault and battery, admits the offender to bail, the recognizance is not void, although the assailed party may afterwards die of the wounds inflicted by the assailant.

Scire Facias, to forfeit recognizance, in Columbia Superior Court. Tried before Judge HOLT, at September Term, 1856.

This was a *scire facias* issued at the instance and suit of the State, against James C. Adams principal, and William Adams security, upon a recognizance alleged to have been forfeited. The principal, James C. Adams, had been arrested under a warrant issued upon the oath of Robert Frank, for an assault and battery committed upon said Frank. Upon being brought before the Justice of the Peace, he entered into recognizance with William Adams as his security, to appear at the next Superior Court for Columbia county, "to answer such matters as shall be then and there charged against him by Robert Frank concerning an assault and battery committed by him, the said James Adams, on the said Robert Frank, and do not thence depart without leave of said Court." This recognizance is dated, 13th December, 1851: On the 24th December, thereafter, Frank died of the wounds inflicted by Adams in said assault and battery. At the March Term, 1852, of the Superior Court, an indictment for *murder* was handed out by the Attorney General, and a true bill found.

The defendant failed to appear and answer the charge of

murder, and this *scire facias* was issued to forfeit his recognizance.

The surety, William Adams, was alone served, who appeared and pleaded:

1st. *Nul tiel* record.

2d. Duress.

3d. That his principal had never been charged with or called on to answer the offence of assault and battery in proper and legal form made.

4th. That the bond was void, and there could be no forfeiture thereof, so as to charge the surety.

All the evidence offered was the original affidavit, warrant and recognizance; the indictment which was for *murder* only; the order forfeiting the recognizance and the following extract from the *scire facias*, viz: "On which said 24th day of December, in the year aforesaid, (meaning aforesaid in said true bill,) and in said county, the said Robert Frank, of the said mortal wound died; and whereas the said assault and battery and cutting with a knife aforementioned in said affidavit, warrant and recognizance are the same, with those charged in said true bill, and the said murder the result thereof:"

After argument by counsel, the Court charged the jury that they must find, from the evidence before them, that the principal, James C. Adams, was arrested, a preliminary examination had, a conviction of the charge, and an order for bail, before they could find against the surety; but that the jury might infer from all the papers and from the fact that the bond was given, that all said pre-requisites had been complied with or waived. The Court further charged the jury that there was a legal forfeiture of the bond, if it was shown that an indictment for murder had been found, and the principal had failed, when called, to appear and answer the same, and that, in every charge of murder, there is included a charge of assault and battery. The Court further charged

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the jury that the recognizance must show upon its face that the principal stood charged with or was required to answer to some offence against the law of Georgia.

The Court declined to charge the jury, as requested in writing by defendant's counsel, that there was no forfeiture of the bond, unless it was shown that a charge of assault and battery had been made, and made by Robert Frank. The Court declined to charge, being in like manner requested, that the bond must stand or fall by itself, and that it must show within itself every thing necessary to authorize the Magistrate to take it. The Court declined to charge, being in like manner requested, that if the jury found that the offence, with which James C. Adams was charged, resulted in homicide, the Magistrate had no authority to take the bond, and that it was therefore void. The Court declined to charge, being in like manner requested, that, if the original affidavit charged only an assault and cutting or stabbing, the bond for assault and battery was void.

The Court did charge the jury that the bond would be legally forfeited by the departure of the principal without leave of the Court, and that there was a charge of a specific offence stated in the bond.

The jury returned a verdict for the plaintiff in *Scire Facias* for the amount of the penalty of the bond—one thousand dollars.

Whereupon, before the adjournment of said Court, counsel for the defendant, William Adams, moved the Court for a new trial on the following grounds:

1st. Because the verdict was contrary to law, evidence, the weight of evidence, and without evidence.

2d. Because the verdict was contrary to the charge of the Court in this, that the Court charged the jury that they must find, from the evidence before them, that the principal, James C. Adams, was arrested, a preliminary examination had, a conviction of the charge, and an order for bail, of which facts

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there was no evidence whatever, nor was there any evidence of any waiver of such arrest, examination, conviction and order.

3d. Because the Court erred in charging the jury that they might infer, from all the papers and from the fact that the bond was given, that all said pre-requisites had been complied with or waived.

4th. Because the Court erred in charging the jury that there was a legal forfeiture of the bond, if it was shown that an indictment for murder had been found, and the principal had failed, when called, to appear and answer the same.

5th. Because the Court declined to charge, as requested by defendant, that there was no forfeiture of the bond unless it was shown that a charge of assault and battery had been made, and made by Robert Frank.

6th. Because the Court declined to charge, as requested by defendant, that the bond must stand or fall by itself, and that it must show within itself every thing necessary to authorize the Magistrate to take it.

7th. Because, while the Court charged the jury that the recognizance must show a charge of some offence against the law of Georgia, they found for plaintiff, notwithstanding the bond did not state the offence to have been committed any where in the State.

8th. Because the Court charged the jury that the bond would be legally forfeited by the departure of the principal without leave of the Court.

9th. Because the Court charged the jury that there was a charge of a specific offence stated in the bond.

10th. Because the Court charged the jury, that, in every charge of murder, there is included a charge of assault and battery.

11th. Because the Court declined to charge, as requested by defendant, that if the jury found that the offence, with which James C. Adams was charged, resulted in homicide,

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the Magistrate had no authority to take the bond, and that it was therefore void.

12th. Because the Court declined to charge, as requested by defendant, that, if the original affidavit charged only an assault and cutting or stabbing, the bond for assault and battery was void.

13th. Because the verdict was contrary to the charge of the Court.

It was consented and agreed between counsel for the parties that a brief of the testimony should be filed in vacation, and that the argument should be heard at chambers, and an order was passed that the motion operate as a supersedeas until the further order of the Court. After argument by counsel, the Court at March Term 1857 of the Superior Court of Columbia County, overruled the motion for a new trial. Whereupon, the defendant excepts, and says that the said ruling and decision was erroneous upon each and all the grounds taken in the motion for new trial:

MILLERS & JACKSON, for plaintiff in error.

WILLIAM R. McLAWS, Attorney General; and J. C. SNEAD & SON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion:

Was the Court right, in overruling the motion for a new trial?

The second and third grounds of the motion, will be taken together.

[1.] It was not necessary to make the recognizance good, that the principal should have been arrested, that there should have been a "preliminary examination had, a conversion of the charge, and an order for bail."

"It is said that it is safe to state," (in the *mittimus*) "that the party has been charged on oath, but this is not necessary;

for it has been resolved, that a commitment for treason or for suspicion of it, without setting forth any particular accusation or ground of suspicion is valid. And it was recently decided, not to be necessary, because a commitment may be *supervisum* and then no oath is requisite." 1 *Chitty Cr. Law*, 110 ; (*Mar.*) and see the form of a recognizance, 1 *Arch. Cr. Pl.* 56.

Now, certainly the recognizance of bail, which is the accused party's own chosen substitute for the commitment, need not state more than the commitment need state.

1. Admit therefore, that the jury did find against this charge, the fact is of no consequence.

This disposes of both of these grounds. It may be remarked, however, in reference to the last of the two, that as the Justice had jurisdiction, it is to be *presumed* that everything happened, necessary to make his action regular.

The fifth ground of the motion is, "because the Court erred in charging the jury that there was a legal forfeiture of the bond, if it was shown that an indictment for murder had been found, and the principal had failed, when called, to appear and answer the same."

The condition of the recognizance was, that the principal should appear at Court "to answer such matters as" should be "charged against him by Robert Frank, concerning an assault and battery committed by him the said James Adams, on the said Robert Frank, and" should "not depart thence without leave of said Court."

The principal was to appear at the Court and not depart from it, *without the leave of the Court*. This was a part of the condition; and such a part is usual in the condition of such recognizances. See form.—*Arch. (Supra.)*

Now, some effect is to be given to this part of the condition, and the most restricted effect that can be given to it, doubtless, is, to make it require the principal to attend, upon the Court, until, at least, the whole of his liabilities to the crim-

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inal law for his *assault and battery of Frank* has been satisfied.

This much effect then, we think, ought to be given to this part of the condition.

Was it among his, the principal's, liabilities to the criminal law, for his *assault and battery of Frank*, that he might be indicted for the *murder* of Frank? Most certainly. Death, it was certain, might result from the assault and battery, although it had not done so, when the condition was entered into: the assault and battery might have had malice for its motive. It was certain that if both of these things should concur, the assault and battery would enlarge itself into a murder. He was liable to the criminal law, for whatever the assault and battery might enlarge itself into. He undertook by the condition of his bond, (so we construed it,) to attend upon the Court, until *all* his liabilities growing out of the assault and battery should be satisfied. Therefore, he undertook to attend until his liability to the indictment for murder should be satisfied, for that is an indictment founded on the assault and battery, that being such, that the beaten party after a while, died of it.

He failed to attend on the Court to answer to this indictment. In this, therefore, he broke the condition of his bond.

[2.] It is not true, then, that the Court erred in charging the jury, that there was a forfeiture of the bond, if an indictment for murder had been found, and the principal had failed to appear.

The sixth ground is, "because the Court declined to charge as requested by defendant, that the bond must stand or fall by itself, and that it must show within itself, every thing necessary to authorize the magistrate to take it."

The meaning of this request is, that the bond ought to contain a recital of the matters mentioned in the second ground, viz: a recital, that the principal "was arrested," &c. But a recognizance may be good, even though no such matters as these, *ever existed*. See what was said on the second ground.

As to the seventh ground:

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[3.] There is no law that says, that a recognizance of bail is void, if it does not recite that the offence was committed in the *State*.

The eighth ground may be treated as disposed of by what was said of the fourth ground.

What law is there, that was violated by the charge of the Court referred to in the ninth ground?

[4.] As to the tenth ground: Every charge of a Court, like every other written or spoken thing must be taken *secundum subjectam materiam*. The subject which this Court had before it, was murder by cutting with a knife, not murder by giving arsenic. And every murder by cutting with a knife, *does* include an assault and battery.

Besides, suppose the jury had understood the Court as intending to say, that murder by poison includes an assault and battery, what harm could it have done? Would the new trial act of 1854, (Acts, 46,) have to be so construed as to include such a case?

[5.] As to the eleventh ground. At the time when the Justice acted, the man cut with the knife had not died. The offence therefore, as it was at that time, could not be murder. The Justice had jurisdiction to look into the affair. He did look into it, and considered the offence an assault and battery. And what he in the exercise of his jurisdiction, considered the offence to be at that time, the offence is to be considered as having been at that time, notwithstanding, that the offence afterwards developed itself into one of a higher grade than that of an assault and battery.

The jurisdiction of a Justice, is to be determined by what is the state of things at the time when he *acts*, not by what is their state afterwards.

There is, manifestly, nothing in the twelfth ground.

Nor do we think that there is, in the first, and thirteenth.

Upon the whole, therefore, we affirm the judgment refusing the new trial.

Judgment affirmed.

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NO. 4.—DAVID B. M. SHEPPARD, plaintiff in error, vs. WILLIAM A. SHEPPARD, et al. defendants in error.

A marriage being in contemplation between David B. M. S., and Mary J. M., it was "covenanted and agreed" by him, on the one part, and her and certain persons as her trustees, on the other,—That the right to the property then held by her, or that might afterwards come to her, should "forever remain in her," by whatsoever name she might assume, "and to the issue of her body forever;" that no part of the property should ever be subject to any debt of his; that he, with her, should enjoy the profits of the property during her life; "she reserving to herself the right in all cases, with the consent of the trustees, to sell, bargain, grant, or convey, either by deed, will, or otherwise," any part of the property; and that if she should "die intestate, and without issue," the property was to be divided into halves, one of which was to go to him, the other in equal parts to her mother and the children of her sister, Elizabeth G. M.

The marriage took place; she had three children; she died intestate.

Held, That these children took the property in preference to David B. M. S.

In equity, in Liberty Superior Court. Decision on demurrer, by Judge FLEMING, at chambers, 14th May, 1857.

This bill was filed by William A. Sheppard, David W. Sheppard, and Rosa E. Sheppard, minor children of David B. M. Sheppard, by Simon A. Fraser, their next friend, against the said David B. M. Sheppard, administrator of Mary E. Sheppard, deceased, late wife of said defendant, and the mother of complainants.

The bill alleges that the defendant, and their mother, then Mary J. Martin, on or about the 11th of May, 1843, in contemplation of a marriage then about to be solemnized between them, made and executed a marriage settlement, by which they covenanted and agreed that the right and title to the estate then held by said Mary J. should forever remain in her, by whatever name she might assume, and to the issue of her body forever; and also all property that she might thereafter possess or obtain by will, deed, or otherwise; that it was further covenanted and agreed that the said defendant should enjoy with the said Mary, the profits so long as she

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should live; she reserving the right, with the consent of the trustees named in said deed, to sell or convey by deed, will, or otherwise, any portion of said property.

And it was further covenanted and agreed between the parties, that if the said Mary J. should die intestate, and without issue, then the aforesaid property should be divided, one half to the defendant, her intended husband, and the other half to be equally divided between Laurretta Martin, her mother, and the children of her sister Elizabeth G. Mann.

The bill further alleges that after the execution of said marriage settlement, the marriage was solemnized between the defendant and the said Mary J. Martin, and afterwards, on or about the day of 18 , the said Mary J. departed this life, leaving complainants, who are her children, the issue of her body, her surviving; and that since her death, the defendant has taken out letters of administration on her estate, and as such administrator, has taken possession of thirty slaves, (naming them) contained in the said marriage settlement, and all the other property belonging to said Mary J. mentioned and referred to in said settlement. The bill charges, that under said settlement, all said property belongs to complainants as the children of said Mary J.. and they pray that the same be delivered to them and that defendant account for the hire of the negroes, and the rents and profits of the other property, accruing since the death of their mother.

The following is a copy of the settlement appended as an exhibit to the bill:

STATE OF GEORGIA, } Whereas, a marriage is intended to
 Liberty County. } be held and solemnized between David
 B. M. Sheppard, of Chatham county and the aforesaid
 State, and Mary J. Martin of Liberty county and State afore-
 said, and whereas the said Mary J. Martin doth now possess
 in her own right a considerable property, together with the
 third part of the undivided estate of M. M. Martin, her

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brother, now deceased: Now, before the solemnization of the intended marriage, it is covenanted and agreed upon by the said D. B. M. Sheppard, on his part, and Mary J. Martin, Richard F. Baker, Wm. G. Martin, and Simon A. Fraser, trustees of the said Mary J. Martin, on the other part, that the right of title to said estate now held or claimed by the said Mary, shall forever remain in her, the said Mary J. Martin, by whatever name she may assume, and to the issue of her body forever. Also, all property, whether real or personal, or in money, that the said Mary may hereafter possess, or obtain, either by will, deed, or otherwise, by whatever name she may assume, or be hereafter called. And it is further covenanted and agreed upon by the parties to these presents, that no part of the estate herein specified or alluded to, whether the same be real or personal, or mixed, shall at any time be subject to any debt contracted by, or any judgment or execution awarded against the said D. B. M. Sheppard, prior or subsequent to the day of the date of these presents. And it is further covenanted and agreed upon by the parties, that the said D. B. M. Sheppard shall enjoy, with the said Mary, the profits arising from said property, so long as the said Mary shall live, she, the said Mary, reserving to herself the right, in all cases, with the consent of the trustees, to sell, bargain, grant, or convey, either by deed, will, or otherwise, any part or portion of said property that now is, or ever after this may be vested in said Mary, by whatever name she may hereafter assume. And it is further covenanted and agreed upon by the parties, that if the said Mary shall die intestate, and without issue, then the aforesaid property to be divided, half to the said D. B. M. Sheppard, her intended husband, and the other half to be equally divided between Lauretta Martin her mother, and the children of her sister Elizabeth G. Mann.

In witness whereof the parties have hereunto set their hands and seals, this eleventh day of May, one thousand

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eight hundred and forty-three—(interlineation done before signing.)

DAVID B. M. SHEPPARD, *L. S.*
 MARY J. MARTIN, *L. S.*
 RICHARD F. BAKER, *L. S.*
 WM. G. MARTIN, *L. S.*
 S. A. FRASER, *L. S.*

Signed and sealed in presence of

J. S. BRADWELL,
 W. MARTIN FRASER,
 SAMUEL BAKER.

Duly proved and recorded the 3d July, 1843.

By E. WAY, *Clerk.*

A true copy from the Records of Liberty county.

S. A. FRASER, *C. S. C. L. C.*

(Indorsed on Bill of Complaint.)

Service acknowledged. Process and subpoena waived,
 March 1st, 1856.

HARDEN & LAWTON, *Defendant's Solicitors.*

And afterwards, at the April Term, in said year (1856,) of said Superior Court, the said defendant, David B. M. Sheppard, administrator as aforesaid, appeared by his solicitors, and filed the following general demurrer:

LIBERTY SUPERIOR COURT.

In Equity.—The demurrer of David B. M. Sheppard, administrator, &c., of Mary J. Sheppard deceased, defendant, to the bill of complaint of William A. Sheppard, Rosa E. Sheppard, and David W. Sheppard, infants, by their next friend Simon A. Fraser, complainants:

This defendant by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alledged, doth demur in law to the said bill, and for cause of demurrer showeth, that the said complainants have not, by their said

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bill, made such a case as entitles them in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said bill, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to the said bill, and to all the matters and things therein contained, and prays judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill: and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

HARDEN & LAWTON,

Defendant's Solicitors.

Filed this 21st April, 1856.

S. A. FRASER, *Clerk.*

After argument had, in vacation, Judge FLEMING overrulep the demurrer, holding that complainants, as the children of said Mary J. under the terms and provisions of the marriage settlement, were entitled at her death to the whole property therein contained.

To this decision, defendant excepted, and assigns error.

HARDEN & LAWTON, for plaintiff in error.

WARD & OWENS; and JONES, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

It is impossible for us to reverse the judgment of the Court below in this case, without overruling *Holmes vs. Liptrot*, 8 Ga. Rep. 279.

That case has been directly attacked by the plaintiffs in error; and it has indirectly been admitted by them; and therefore it is perhaps, that the case has not been defended by the other side.

We are not asked to overrule the case.

We are but two of the three Judges.

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We therefore, are not prepared to entertain the question, whether the case should not be overruled.

If that case is not overruled, the judgment in this, must be affirmed; for that was a case in which the only person mentioned as the person in whose favor the covenant of the husband was to operate, was the wife, and yet the Court held, that the covenant was fatal to him, in a contest between him, and the wife's *children*; and this is a case in which there is just such a covenant by the husband, and in which there are also other covenants by him, and it is a question by no means free from difficulty, whether those *other* covenants are not, *of themselves*, fatal to the husband's pretensions.

Upon the whole, we say, that we cannot reverse the judgment of the Court below.

Speaking for myself, I must say also, however, that I very much doubt, *Holmes vs. Liptrot*.

Judgment affirmed.

NO. 5.—CHARLES T. BEALE, plaintiff in error, vs. BENJAMIN F. HALL, defendant in error.

- [1.] Letters of administration granted by the Ordinary to the Clerk of the Superior Court, under the 2d section of the Act of January 20th, 1852, do not cease with the expiration of his term of office as Clerk.
- [2.] The pleadings need not aver the grounds upon which an administrator is entitled to the letters, even if the letters express them.
- [3.] Evidence that a party conveyed property to defraud his creditors, inadmissible in an action by his administrator to recover the property conveyed, but where there is an absence of proof of creditors, the administrator may offer proof that the intestate was induced to convey by exciting his fears of future embarrassments and was thus made the victim of the fraudulent contrivance of the person to whom the conveyance was made.

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- [4.] No error, for the Judge of the Superior Court to refuse to allow counsel to withdraw their announcement that they had closed their case, for the purpose of enabling him to examine further a witness, who had been on the stand, in relation to a matter not material to the justice of the case.
- [5.] When two sets of letters of administration, on the same estate, to two different persons are in evidence, and the case shows that one of them must have been offered to the Court only on application for an order to substitute a party, and that the other was offered as proof to the jury as the substituted party's authority to sue, and his title, it is no error in the Court to charge the jury, that the latter letters were conclusive evidence of the administrators' authority to sue.
- [6.] It is error for the Court to charge the jury that nothing had been shown to pass titles to slaves except bills of sale, when there was evidence, however slight, on which it might be insisted that there was a second purchase not evidenced by bills of sale.
- [7.] It is not error in the Court to refuse to charge the jury that in cases of fraud of both parties, it will leave them where it found them. In the absence of fraud in both parties.
- [8.] An instrument of conveyance made to defraud creditors cannot be avoided by the party making it, or his personal representative.
- [9.] The Court may direct the correction of the verdict of the jury in matters of form.
- [10.] No error for the Court to refuse to allow the jury to be polled.
- [11.] New trial refused on the ground taken in the rule, that the verdict was against law, evidence and the preponderance of evidence, but awarded on other grounds.

Trover, in Richmond Superior Court. Tried before Judge HOLT, at October Term, 1856.

This was an action of trover, brought originally by Oswald E. Cashin, administrator of Gazaway Beale, deceased, against Charles T. Beale, for the recovery of three negro slaves, alleged to be the property of the intestate. Cashin was appointed administrator by virtue of his office, (Clerk of the Superior Court,) and at the expiration of his term, the suit was prosecuted by Benjamin F. Hall, who had been appointed administrator *de bonis non*, likewise by virtue of his office.

The facts of the case, and the points decided which arose thereon, will fully and sufficiently appear, from the bill of exceptions and the opinion of the Court.

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The following is the bill of exceptions, viz:

STATE OF GEORGIA, } In the Superior Court, April
 Richmond County. } Term, 1857.

Charles T. Beale, plaintiff in error, }
 vs }
 Benjamin F. Hall, Administrator of } *Bill of Exceptions.*
 Gazaway Beale, deceased, defend- }
 ant in error. }

Be it Remembered, That at the October Term, 1856, of the Superior Court of Richmond county, there was called, and came up for trial on appeal, the case of Oswell E. Cashin, administrator of Gazaway Beale, deceased, against Charles T. Beale, being a Common Law action of Trover for the recovery of three negro slaves, viz: Matt, Buck, and Martha; the parties being at issue before a Special Jury, the Court, on the motion of plaintiff's counsel, and which was objected to by defendant's counsel, allowed plaintiff to amend his pleading, by substituting Benjamin F. Hall, administrator, *de bonis non*, of Gazaway Beale, deceased, as the party plaintiff in the case, in the place of said Oswell E. Cashin, without *scire facias*, or other notice to the defendant—there being no motion for a continuance, on account of surprise—and to which decision of the Court, defendant's counsel excepted.

In the further progress of said trial, defendant's counsel excepted to the plaintiff's pleadings, for the reason, that in the declaration it was not alleged that Oswell E. Cashin was the administrator of Gazaway Beale, in his character of Clerk of the Superior Court of Richmond county, which fact appeared from the letters of administration, put in evidence by plaintiff.

Further: In the progress of said trial, the plaintiff was allowed to introduce the parol testimony of witnesses Rhodes and Greenwood, which went to show, that the deeds relied upon by the defendant, were not what they purported to be, to-wit: absolute bills of sale, but that they were intended to

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protect the property of Gazaway Beale from the claims of his creditors, to which defendant objected; which objection, as well as a subsequent one, that the Court would rule out and withdraw all such testimony from the consideration of the jury, was overruled by the Court; counsel for defendant excepting.

In the further progress of the trial of said case, defendant's counsel moved the Court to be allowed to recall his announcement that he had closed his case, in order to prove the fact, by the witness Simpson, that, "*at the time defendant paid Gazaway Beale five hundred dollars, both the Beales being present, the defendant asked Simpson, whether the title papers he already had would do? and Simpson told him they would.*" The application to the Court having been made, on the opening of the Court, the next morning after the announcement, and before the argument on the facts had commenced, counsel for the defendant stating in their place, that they were not aware of the fact sought to be proved until after the announcement was made: which motion was overruled by the Court, and to which defendant's counsel excepted.

Further: In the progress of the trial of said cause, the counsel for defendant requested the Court to charge the jury, that "if they find Benjamin F. Hall, Clerk of the Superior Court, is not the legally appointed administrator of Gazaway Beale, they ought to find for the defendant;" which charge the Court gave, but qualified it by adding thereto the *remark*, that "*the letters of administration of said Hall are conclusive evidence of the fact of his administration, and establish his right to sue;*" to which additional qualification, by the Court, to said charge, so asked, the counsel for defendant excepted.

In the further progress of said trial, the Court charged the jury, that "nothing had been shown to pass the title of the slaves, from Gazaway Beale, except the bills of sale," when counsel for defendant had relied, in their argument before

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the jury, upon the facts testified to by witness Simpson, as to showing a sale of the slaves by Gazaway Beale to the defendant, on the day before the blow was received which resulted in the death of Gazaway Beale; and to which charge, the defendant's counsel excepted.

In the further progress of said trial, the counsel for the defendant requested the Court to charge the jury that, "if the jury find that the bills of sale made by Gazaway Beale to the defendant, were made in fraud, and if Gazaway Beale was a party to the fraud, they are good *as against the maker* of them, and carry a good title to defendant; and that in cases of fraud, by both parties, the Court will leave them, where it finds them;" Which said last mentioned charge, as asked, the Court refused to give, and in lieu thereof charged the jury, "That the administrator of a decedent represented the distributees and creditors of his estate; and that an instrument which would be void against the creditors of the deceased, would also be void as against the administrator;" (there having been no evidence of any debts due by the estate of such decedent,) and to which refusal of the Court to give such charge, as asked, and the giving of the charge, as made, to the Jury, in lieu of the one asked, the counsel for the defendant excepted.

In the further progress of said trial, the jury returned into Court with a verdict, which the Court refused to receive and have entered on the minutes; but directed and instructed the jury as to the verdict they must find; the papers being handed to the jury, they returned to their room, and shortly afterward returned with a verdict conforming to the directions of the Court, and which was in the words and figures following, to wit:—"We, the jury, find the defendant guilty, and we assess damages for the plaintiff, in the sum of thirty-seven hundred dollars, for the value and hire of the negroes, Buck, Matt, and Martha: of which, one thousand dollars may be discharged by the delivery of the boy Buck, one thousand dollars by the delivery of the boy Matt, and eight

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hundred dollars by the delivery of the woman Martha, on the first day of January next, to Benjamin F. Hall, administrator, and on payment of costs by said defendant." "Porter Fleming, foreman." The counsel for defendant insisting that the verdict, as originally brought in by the jury, should be received, and that the one last brought in, under the directions of the Court, should not be received—all which was overruled by the Court, and the said latter verdict was ordered by the Court to be entered on the minutes: counsel for defendant excepting. Counsel for defendant, also, further moved the Court, that the jury be polled, which the Court refused, and ordered the verdict recorded; and to which counsel for defendant excepted.

Whereupon, afterwards, and during the said October Term, eighteen hundred and fifty-six, of said Court, the defendant's counsel, before the adjournment of the Court, moved a new trial in said case, on the following grounds, to wit:

1st. Because the verdict was contrary to law, evidence, and the preponderance of evidence.

2d. Because the suit was originally brought in the name of Oswell E. Cashin, administrator of Gazaway Beale, and the Court allowed an amendment of the declaration by making Benjamin F. Hall, administrator *de bonis non*, of Gazaway Beale, the party plaintiff by order of Court, without *scire facias*, or other notice to the defendant.

3d. Because the Court refused to allow the defendant to recall his announcement, that he had closed his case, in order to prove the fact by the witness Simpson, that "at the time defendant paid Gazaway Beale the five hundred dollars, both the Beales being present, the defendant asked Simpson whether the title papers he already had would do;" which application to the Court, was made before the argument upon the facts had commenced: counsel for defendant stating in their place, that they were not aware of the fact until after the announcement was made.

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4th. Because the Court admitted parol testimony from the witnesses Rhodes and Greenwood, which went to show that the deeds relied upon by defendant were not what they purported to be—to wit, absolute bills of sale, but that they were intended to protect the property of Gazaway Beale from his creditors; and because the Court subsequently refused, upon the application of the defendant, to rule out and withdraw all such testimony from the consideration of the jury.

5th. Because the Court in charging the jury, as requested by the defendant, that “if the jury find that Benjamin F. Hall, Clerk of the Superior Court, is not the legally appointed administrator of Gazaway Beale, they ought to find for the defendant,” added to that charge the *remark*, that “the letters of administration of said Hall are conclusive evidence of the fact of his administration, and establish his right to sue.”

6th. Because the Court in his charge to the jury said, that “nothing had been shown to pass the title to the slaves from Gazaway Beale except the bills of sale;” when the counsel for defendant had relied, in their argument before the jury, upon the facts testified to by the witness Simpson, as showing a sale of the slaves by Gazaway Beale to defendant, on the day before the blow was received which resulted in the death of Gazaway Beale.

7th. Because the Court refused to charge the jury, as requested by defendant’s counsel, “That if the jury, found that the bills of sale made by Gazaway Beale to the defendant, were made in fraud, and that if Gazaway Beale, was a party to the fraud, they were good *as against the maker of them*, and convey a good title to the defendant; and in cases of fraud by both parties, the Court will leave them where it finds them.”

8th. Because the Court charged the jury, that the administrator of a decedent represented the distributees and creditors of the estate, and that an instrument which would be void as against the deceased, would also be void as against

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the administrator; there being no evidence of any debts due by the estate of such decedent.

9th. Because the jury returned into Court with a verdict in the following words and figures:

“We, the jury, find for the plaintiff as follows:

For Bill \$1,000, Matt \$1,000, Martha \$800—making		
twenty-eight hundred dollars,	- - -	\$2,800,
For the hire of Billy, four years, \$150 per		
year,	- - - - -	\$600 00
For the hire of Matt, same time, \$125		
per year,	- - - - -	500 00
For the hire of Martha, same time, \$75 per		
year,	- - - - -	300 00

\$1400 00

Less by payment by Charles T. Beale,	500 00	900 00
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Making in the aggregate thirty seven hundred dol-

lars,	- - - - -	\$3,700 00
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We allow medical attention to balance the interest which may have accrued on the negro hire.

We also find, that Charles T. Beale shall be relieved of the payment of twenty-eight hundred dollars, by the delivery of the before mentioned negroes, Billy, Matt, and Martha, to Benjamin F. Hall, administrator, on the first day of January next.” “Porter Fleming, Foreman.”

The Court permitted counsel for plaintiff to write out a verdict for the jury, which when read the Court disapproved, and then the Court dictated the verdict, and instructed the jury that they must so find; the papers were returned to the jury, who returned to their room, and shortly afterwards brought in the verdict as dictated by the Court, which the Court ordered to be placed upon the minutes.

To all of which defendant’s counsel at the time objected, and insisted that the verdict as originally returned by the jury, should be entered on the minutes, which the Court refused to allow.

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10th. Because, the Court refused, upon the application of defendant's counsel, to permit the jury to be polled when the second verdict was rendered.

11th. Because the Court permitted such second verdict, written out by plaintiff's counsel, and returned by the foreman, under the instruction of the Court, as aforesaid, to be entered on the minutes, notwithstanding the objections of defendant's counsel thereto.

12th. Because there was no allegation in the declaration, that Oswell E. Cashin was the administrator of Gazaway Beale, in his character as Clerk of the Superior Court of Richmond county, which fact appeared from his letters of administration, put in evidence by plaintiff.

During the said last October Term of said Superior Court, and before the adjournment thereof, the said grounds for new trial, having been filed, with a brief of the testimony in the case, and the said motion having been argued before the Court, before the adjournment, the Court not having delivered its decision on said motion; it was by consent of parties, with the approval of the Court, ordered that the filing of said grounds and brief should operate as a supersedeas in said cause, till the further order of Court, and that the decision might be rendered and filed during vacation, either party being permitted to except within thirty days after the decision on said motion should be filed. But the decision of the Court not having been made and filed during vacation, but held up till the present Term of said Court, to-wit: April Term, 1857, which commenced on the 13th day of April of the present year, and adjourned on the 16th day of May of the same year, when and during which said Court, to-wit, on the 15th day of April, of said Term, and before the adjournment of said Court, the presiding Judge of said Court delivered a decision on said motion for new trial, overruling the same upon each and all of said grounds.

Whereupon, in open Court, and now here, the defendant, within thirty days after the adjournment of said Court, ex-

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cepts to the decision of the Court in overruling said motion for a new trial, and says that said ruling and decision was erroneous, and presents this bill of exceptions, and prays that the same may be signed and certified, according to the statute in such case made and provided.

MILLERS & JACKSON,
J. C. SNEAD & SONS,
Attorneys for Plaintiff in Error.

Benjamin F. Hall, Adm'r, &c. }
vs. } *Trover.*
Charles T. Beale. }

Copy of the brief of testimony in the case as adduced on the trial, and as agreed between the counsel of the parties, and filed with the grounds for a new trial.

Testimony on the part of the plaintiff:

1. Copy letters administration to Oswell E. Cashin :

STATE OF GEORGIA, } By the Court of Ordinary for said
Richmond County. } county.

Whereas, Gazaway Beale, late of Richmond county, deceased, died intestate, having while living and at the time of his death, divers estates, real and personal, within the said State, by means whereof the full disposition and power of the granting of administration of the estate of the deceased, and also a final dismissal from the same to the Court aforesaid, does of right belong: And they desiring that the same may be well and duly administered and legally disposed of, do hereby grant unto Oswell E. Cashin, Clerk of the Superior Court of Richmond county, administrator, with full power, by the tenor of these presents, to administer the entire estate, both real and personal, of the said deceased, which to him in his life time, and at the time of his death belonged; and to ask, demand, sue for, recover and receive the same, and pay the debts in which the deceased stood bound, so far forth as his assets will extend, according to law, and then the balance,

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if any, to pay over to the legal heirs and distributees of the said deceased.

Witness my hand as Ordinary, and the seal of the said Court, the tenth day of January, eighteen hundred and fifty-three.

LEON P. DUGAS, *Ordinary*.

[SEAL.]

2. Copy letters of administration, *de bonis non*, of Benjamin F. Hall:

STATE OF GEORGIA, } By the Court of Ordinary for said
Richmond County. } county.

Whereas, Gazaway Beale, late of the county and State aforesaid, deceased, died intestate, having, while living, and at the time of his death, divers estates, real and personal, within the said State, by means whereof the full disposition and power of the granting the administration of the estate of the said deceased and also the final dismissal from the same to the Court aforesaid does of right belong. And they desiring that the same may be well and truly administered, and legally disposed of, do hereby grant unto Benjamin F. Hall, Clerk of the Superior Court for the county aforesaid, administrator, *de bonis non*, full power, by the tenor of these presents, to administer the estate, both real and personal of said deceased, which to him in his life time and at the time of his death did belong, and to ask, demand, sue for, recover and receive the same, and to pay the debts in which the deceased stood bound, so far forth as his assets will extend, according to law, and then the balance if any, to pay over to the legal heirs and distributees of the said deceased.

Witness my hand as Ordinary, and the seal of said Court, this 17th day of April, 1856.

[SEAL.]

FOSTER BLODGET, Jr., *Ordinary*.

3. *Dr. Alexander Martin*, sworn: Knew Gazaway F. Beale, deceased; knew the slaves ten years ago, in possession of deceased.

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Buck aged about 30 years, worth	- - -	\$1,000
Matt aged 28 or 30 years, "	- - -	1,000
Martha aged about 20 years, "	- - -	800

That he hired Buck, in 1850 or 1861, for \$140, from defendant, who said he was the property of deceased.

They went by the name of Gaz. Beale's negroes.

That he gave a note for the hire to defendant, and paid the money to him, he received the note from defendant when he paid it; does not remember that at the time he paid the note, that defendant said he was the agent for Gaz. Beale.

4. *Henry Greenwood*, sworn: Knew Buck and Matt, in the possession of Gaz. Beale, some 7 or 8 years ago.

Buck worth	- - - - -	\$1,000
Matt "	- - - - -	900

Has not seen Matt in 5 years, if he is now as he then was, he would be worth \$1,000 and Buck would be worth \$1,200. Buck's hire from 1852 to this time, would be worth \$150, and Matt's about \$125 per year.

5. *Richard B. Day*, sworn: Knew Buck and Matt, and afterwards deceased had a woman named Martha. He hired one of the negroes from Gaz. Beale.

Knew them in his possession, (the boys,) about 12 years or a long time. Cannot say how long he had them before his death. Knows nothing of the negroes, after they went to Burke county. Was authorized by the plaintiff Cashin, to demand the negroes. This was in 1852 or '3, before the suit was brought; defendant refused to give them up.

Cross-Examined.—He first spoke to counsel, but had not employed any. The negroes were in possession of deceased when he left Columbia county, say two or three years before his death. Does not remember when he died. Defendant said he would not give them up. He might have said "he claimed them," or he might have said, "he had bought them." He demanded the negroes in Augusta, but had no written

authority. When I left Burke county to demand them, I had written authority.

6. *John A. Christian*, sworn: Knew the boys in deceased's life time, and bargained for Buck the Friday before his (deceased) death. On the same day, I saw defendant in relation to the trade, who said there was no incumbrance on him. He hoped I would not buy them, as they were family negroes, and if Gaz. was bent on selling them, that he would buy them himself.

When Gaz spoke to me about the sale, he was drinking.

The negro was in Burke county. Defendant said in the conversation with him, that if he was sold, he would have to make the title to him.

Deceased had been frolicking before his death. Defendant in this conversation, did not in any way deny the right of Gaz. to sell them. He said the title was in him, defendant.

Testimony for defendant.

1. *Dr. Henry F. Campbell*, sworn: Knows the negroes that he was called upon by the defendant to treat; their names were according to his recollection, Madison and William. Matt is a common abbreviation. Each of them had hernia, which disease impairs the value of a slave one half. This disease is not only of great inconvenience, but may result in loss of life. The hernia in one, had lasted some 8 or 10 months. I think it was some 18 months ago, that they were brought to me for treatment.

2. *Henry Dawson*, witness, examined under commission, to which was annexed the original bill of sale, dated 18th February, 1848, a copy of which is hereto annexed, marked, "*Bill of sale, No. 1,*" deposed and answered as follows:

"I know the parties, I reside in Burke county. I drew the annexed bill of sale. Gazaway Beale was in life at the time it was done.

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The bill of sale was drawn at my house at night. There was no money paid, nor no notes given that night. Charles T. Beale, asked me if he must give notes that night, or would next day answer. I thought next day would answer.

I have known the slaves named in said bill of sale to be in possession of defendant. They went into his possession from the date of the bill of sale, and remained in his possession to about 1853, at about which time he carried them to Richmond county.

I hired the boy Billy Buck from defendant and gave my note to him for the hire."

Answers to Cross Interrogatories.—"The understanding was, that Charles Beale, was to give his note the next day.

There was no money paid at the time. The understanding was that Gazaway F. Beale was to hold the bill of sale till next day, at which time he was to receive the notes, and give it up to Charles T. Beale.

I was called on by both parties to draw the bill of sale: when drawn, delivered the same to Gazaway Beale.

I know nothing more that will benefit the plaintiff."

3. *Augustus R. Roberts*, whose testimony was taken by commission, deposed and answered as follows:

"I know the parties. I knew Gazaway Beale, in his life time. I reside in Burke county.

I was present at the time of a sale of slaves known as Madison and Billy Buck, to defendant. Gazaway F. Beale sold them to him. There was a bill of sale given to Charles T. Beale.

There was neither notes nor money given at the time the bill of sale was drawn. In a conversation, some two or three days afterwards, Gazaway F. Beale, told me he had received the notes for said negroes."

Defendant claimed said slaves as his property while in Burke county, and paid taxes for the same."

Answers to Cross Interrogatories.—"The bill of sale was written at Henry Dawson's, February 18, 1848. Henry Dawson, Charles T. Beale, and Gazaway F. Beale, and the family of Mr. Dawson, were present.

I recollect no conversation but what is stated in the above interrogatory.

The consideration was sixteen hundred dollars. He wanted to turn the negroes into money, and sold them to Charles T. Beale, for that purpose."

The bill of sale (marked *Bill of sale No. 1.*) was then offered in evidence, and read to the jury.

4. *Elhanan W. Johnson*, and *Hugh Torbet*, whose testimony was taken by Commission, to which was annexed the original bill of sale, dated Sept. 2d, 1851, a copy of which is hereto annexed, marked, "*Bill of sale, No. 2.*" deposed and answered as follows:

"E. W. Johnson, states that he does know the parties. Dr. Hugh Torbet states that he is acquainted with the defendant.

Both witnesses say that they were acquainted with Gazaway Beale, in his life time, and that they have seen him write, and that they are acquainted with his hand writing.

"E. W. Johnson states that from his knowledge of Gazaway Beale's hand writing, he fully believes the signature in the receipt to be in his own hand; and Hugh Torbet states that he saw Gazaway Beale sign the bill of sale attached.

"E. W. Johnson states that he does not know any thing of the execution of the aforesaid paper. Hugh Torbet states that he was present when Gazaway Beale executed the above named bill of sale, and delivered it to Charles T. Beale.

"The witnesses both state that they don't know anything more, that will benefit the defendant."

The bill of sale, (copy marked "*Bill of sale No. 2.*") was then offered in evidence and read to the jury.

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5. [Bill of Sale No. 1.]

Georgia, } Know all men by these present, That I,
 Burke County. } Gazaway F. Beale, of the county and State
 aforesaid, for and in consideration of the sum of sixteen hundred dollars, to me in hand paid by Charles T. Beale, of the same place, the receipt of which I do hereby acknowledge, have granted, bargained and sold and by these presents do grant, bargain and sell, unto the said Charles T. Beale, his heirs and assigns, the following property, viz; Two negro men, one by the name of Mat, about twenty three years of age; and the other by the name of Billy Buck, about twenty-two years of age. To have and to hold the aforesaid bargained negroes, to him the said Charles T. Beale, his heirs and assigns forever.

And I the said Gazaway F. Beale, for myself, my heirs, executors, and administrators, all and singular, the said bargained negroes, unto the said Charles T. Beale, his heirs and assigns, against me, and my said executors and administrators, and against all and any other person and persons whatever, shall and will warrant and defend by these presents.

In witness whereof, I have hereunto set my hand and seal, this eighteenth day of February, one thousand eight hundred and forty-eight.

GAZAWAY F. BEALE, L. S.

Signed sealed and delivered in presence of

HENRY DAWSON, J. P.

6. For value received I assign the within bill of sale to James M. Simpson.

C. T. BEALE.

Augusta, Nov. 20th, 1852.

7. GEORGIA, }
 Burke County. } Clerk Office Superior Court.

Recorded in Record Book deeds, No. 11, folio 238. January 25th, 1854.

EDWARD GARLICK, Clerk
 Superior Court B. C.

8. [Bill of Sale No. 2.]

September 2nd, 1854.

Received of C. T. Beale six hundred dollars, it being in full for the purchase of one negro slave named Martha; the right and title to said slave I will warrant and defend against the claims of all other person or persons whatever, and likewise warrant her sound.

And witness my hand and seal.

GAZAWAY F. BEALE, [SEAL.]

James M. Simpson, sworn: Bill of sale from deceased to defendant shown him. Defendant borrowed some money from him, say \$500 or \$600, to finish paying for two negroes That he paid deceased the money. Defendant was living with him at the time. This was in 1851 or 1852.

I took a transfer of the bill of sale as security.

Defendant returned me the \$500, or whatever sum I loaned, and I returned him the bill of sale.

Gaz. Beale who was present, said he was satisfied, and that defendant had paid him all the money. And said it was for the purchase of the negroes.

Gaz Beale died in two or three days after the transfer to me. He was sober at the time of the transaction. Deceased was knocked in the head on Sunday night. This was the Saturday before.

Does not think the transfer was made to him in Gaz. Beale's presence, and does not remember hearing defendant say that he held the negroes for the benefit of his brother.

About this time, heard defendant say, that Christian wanted to buy one of Gaz's boys; the object of the conversation, was to borrow money from witness to pay the balance due by defendant to deceased, for the negroes.

In this conversation, defendant spoke of them as Gaz's negroes. Defendant said they were family negroes, and if they were sold, he would buy them himself. At the time the \$500 were paid, no notes were surrendered by Charles T. Beale, to Gaz. Beale. Witness saw no notes.

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10. *Plaintiff in rebuttal.*—*Rhodes*, sworn. He knew deceased; did not know the negroes. Had a conversation with defendant, but does not know how many years ago. Many years ago, perhaps ten years. He said he intended to fix Gaz's property. Is distantly related to widow of deceased.

11. *John A. Christian*, recalled by defendant. Gaz Beale died in November, 1852; the conversation I had with him, was the Friday before his death.

12. *Richard B. Day*, recalled by defendant. Beale lived some three days after the blow he received, which resulted in his death.

13. *William Doyle*, sworn for defendant. Swore that deceased died on the 25th of November, 1852, or about that time.

14. *Henry D. Greenwood*, recalled for plaintiff. Defendant told me that he was on his way to see Mr. Dawson to get him to write a bill of sale to secure the property to deceased's wife and children, as deceased was a frolicksome man, and said something about securing it against creditors. Witness told him, he would expose any such transaction. Defendant told him, on his return, he had secured the property.

This was about eight years ago—not immediately preceding the death of Beale.

15. The Almanack was introduced by defendant, which showed that the 20th November, 1852, was Saturday.

16. *Barnard Abrahams*, sworn for defendant: Stated that Gazaway F. Beale was buried on the 26th November, 1852.

MILLERS & JACKSON, and SNEAD & SONS, for plaintiff in error.

JENKINS; and T. CONE, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] At the trial of this cause the following order was passed by the Court: "It appearing to the Court that Oswell E. Cashin, plaintiff on the record, was administrator in virtue of his office, as Clerk of the Superior Court of Richmond county, that said Oswell E's term of service has expired and that Benjamin F. Hall is Clerk and *ex-officio* administrator of Gaway Beale, be, and is hereby made a party plaintiff as such administrator, in lieu of said Oswell E. Cashin, the said Benjamin F. having been by the Ordinary of said county, appointed administrator, *de bonis non*, in virtue of said office of Clerk of the Superior Court of said county, and letters of administration having been issued to him, which are now here to the Court shown."

The order was objected to by counsel for the plaintiff in error. The objection was overruled and the decision of the Court is excepted to. The order shows that the Court below held, that administration in cases like the present, when granted to the person who is Clerk of the Superior Court, expires with his term of office, and that it becomes the duty of the Ordinary to grant letters to his successor. It also expresses the judgment of the Court, that the Clerk of the Superior Court became *ex-officio* administrator of the intestate's estate. These propositions are not sustained by the act of the General Assembly. *Pamp.* '51 & '52., page 92. If the office of administrator were made by law appurtenant to the office of Clerk of the Superior Court, the administration would vest in him, in virtue of that office. His commission as Clerk would become his commission as administrator, and there would be no necessity for his appointment by the Ordinary. If the statute had vested in the Clerk of the Superior Court the right only, to the administration on the decedent's estate, to the exclusion of all other persons, then the Ordinary must have made the grant to him. He would have had no discretion. But such is not the statute. It does not vest the administra-

tion in the Clerk, nor does it vest in him an exclusive right to it. It makes it the duty of the Ordinary to vest the administration of the estate in the Clerk of the Superior or Inferior Court of the county, or in any other person or persons in said county, whom *he shall deem fit and proper* for such administration. The object is to ensure the administration of estates. The Ordinary is required to give thirty days public notice before he grants administration under the act, to the end, no doubt, that persons entitled to it under the law, as kindred or creditors of the deceased person, might apply and take it, if they desire to have it. If there be no application, then the Ordinary exercises his statutable discretion by bestowing it on some fit and proper person of the county. The Clerks are mentioned, not to control the discretion of the Ordinary, but simply as a legislative indication of persons to whom, from their position, it might be safe to commit so important a trust. The administration, when granted, vests in the person to whom it is committed, to be revoked or vacated as ordinary administrations. To hold that the administration, when granted, followed the office, would deprive the Ordinary of the discretion manifestly given him by the act, and by possibility, devolve it on a person destitute of the business or moral qualifications to discharge its duties. The administration granted to Cashin, did not, therefore, abate or expire with the expiration of his term of office, but his office of administrator continues, and is on the same footing of administrations granted in ordinary cases.

[2.] Letters of administration are admissible in evidence to prove title, and authority to sue, and no averment in the pleadings is necessary, of the grounds upon which the administrator became entitled to them. The words "*Clerk of the Superior Court of Richmond County,*" in the letters of administration to Oswell E. Cashin, might be rejected as surplusage, and they would be good.

[3.] The evidence of Rhodes and Greenwood, does not prove, nor tend to prove, that the deeds relied upon by the

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defendant were not what they purported to be, absolute bills of sale; but the object was no doubt to prove that, absolute bills of sale as they were, they were obtained by the fraud of the defendant. He told one of the witnesses he intended to fix Gaz's property. He said to the other, that he was on his way to Mr. Dawson's to get him to write a bill of sale to secure the property to deceased's wife and children, as deceased was a frolicsome man; and said something about securing it against creditors. Defendant told him on his return, he had secured the property. This was certainly evidence for the consideration of the jury, on the issue of fraud or no fraud, on the part of the defendant—whether it was a contrivance of his own to induce the deceased to convey the negroes absolutely to him. These witnesses do not connect the deceased with a scheme, originating with himself, or concerted with others, to defraud his creditors. If the plaintiff had offered evidence to prove that his intestate had planned a scheme to defraud his creditors, and in execution of it, had conveyed his property, it would have been inadmissible, unquestionably, in this action, but he certainly cannot be precluded from proof that his intestate was circumvented and induced by the defendant to convey his property absolutely to him, under the apprehension that his imprudent course of life might bring upon him pecuniary embarrassments, which would deprive him and his family of the means of support. There is no evidence in the record showing that the intestate was indebted at the time of the conveyance, or that he proposed the transfer of the property. The evidence was admissible to enable the jury to determine whether the intestate was the author of a fraud against his creditors, and executed the bill of sale in furtherance of his project, or whether he was the victim of the contrivance of another, who excited his fears and obtained a conveyance of his property without consideration, under the pretext that he would hold it for his benefit or that of his family. If the former, the administrator ought not to recover; if the latter, the defend-

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ant should not be allowed to retain the property. 1 *Greenleaf on Ev.* §284; *Logan and others vs. Bond*, 13 *Ga. Rep* 201.

[4.] The refusal of the Court to allow the defendant below to withdraw his announcement that he had closed, is excepted to. The object was to re-examine the witness Simpson, and to prove that at the time the defendant paid Gazaway Beale five hundred dollars, both Beales being present, the defendant asked Simpson whether the title papers he already had, would do? and Simpson told him they would. This Court has held that the Judges of the Superior Courts have "the discretionary power to relax the rule in regard to the examination of witnesses where justice requires that it should be done; and the judgment of the Court will not be reversed for the relaxation of the rule, or the refusal to relax it, unless the error be gross and palpable." *Walker vs. Walker*, 14 *Ga. Rep.* 250. Was there gross error, or any error at all in the refusal of the Court to allow this witness to be re-examined, to make that proof? The witness had been examined. He testified that the plaintiff in error borrowed \$500 or \$600 from him, to finish paying for two negroes, and that he (plaintiff in error) paid deceased the money. Gazaway Beale said he was satisfied, and that plaintiff in error had paid him all the money, and said it was for the purchase of the negroes. This is what he testified to in regard to Gaz. Beal's statement. He, about this time, heard the plaintiff in error say that Christian wanted to buy one of Gaz's boys. The object of the conversation was to borrow money from witness to pay the balance due by the plaintiff in error to the deceased, for the negroes. The plaintiff spoke of them as Gaz's negroes. Defendant said they were family negroes, and if they were sold, he would buy them himself. This conversation took place on Saturday. On Saturday the money was borrowed and the transfer of the bill of sale was made to witness. On Saturday the plaintiff in error said that Christian wanted to buy one of Gaz's negroes, and that

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they were family negroes, and if they were sold, he *would* buy them himself. And yet the witness says the object of this identical conversation was to borrow money to pay the balance due by the deceased for the negroes. The Court below had a right to infer from this testimony that, if what plaintiff in error said was true, to-wit: that if the negroes were sold he *would* buy them himself, he had not bought them when he wanted to borrow the money; and that, if he had not bought them, he could not have paid already a part of the purchase money, and that he could not have wanted to borrow money to pay the balance; and to hold that the evidence was not therefore material. The object of the party in wishing to make the additional proof by witness, was to enable him to insist upon it before the jury as an implied admission of the sale of the negroes. The question was not propounded to the deceased, nor does it appear that his attention was particularly called to it, or that he was bound to reply. If he had made no sale, he could not have imagined that he was called on to deny it. He was not appealed to. This kind of evidence ought to be cautiously received, and never, unless the circumstances show that a man of ordinary prudence would have spoken. Before uncontradicted statements in the presence of a party are held to be implied admissions against him and his interests, there should be evidence of direct declarations of that kind which naturally call on him to contradict them. 1 *Greenleaf Ev.* §199. There was, therefore, no error in the refusal of the Court to re-open the case to admit the proposed evidence.

[5.] The counsel for plaintiff in error, requested the Court to charge the jury, that, "if they find Benjamin F. Hall, Clerk of the Superior Court, is not the legally appointed administrator for Gazaway Beale, they ought to find for the defendant." There were two sets of letters of administration. The Court below had already decided that the grant to Cashin was vacated by the expiration of the term of his office as Clerk of the Superior Court. It was upon this assumption,

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that the Ordinary granted the letters to Hall. It was not the case, then, in the opinion of the presiding Judge, of a second grant of administration during a subsisting good administration. There was no issue before the jury between the two administrators. The letters to Cashin were not offered as evidence *to the jury*, and could not have been, for they were offered by the *plaintiff* not to prove title in Cashin, but were offered as evidence *to the Court* to lay the foundation, or proof of the expiration of his office of Clerk of the Superior Court and the election of Hall, for the order substituting Hall as plaintiff for Cashin in whose name the suit had been instituted. If this were so, the only letters of administration before the jury for their consideration, were the letters granted to Hall, the substituted administrator, and his letters were conclusive of his right to sue—just as conclusive as those of any administrator—and the charge of the Court, in this aspect of the case, was right. If the letters of administration granted to Hall were void on account of the prior grant of administration, which had not been vacated or become null, he had no title, and could not recover, but there must have been evidence of this *before the jury*. The jury have no right to consider evidence submitted to the presiding Judge alone as the foundation of an order deemed by him necessary in the progress of the case.

The judgment of this Court reverses the judgment of the Court below, making Hall the plaintiff in the cause, in lieu of Cashin. The administration of Cashin is good until avoided by judicial sentence. The second grant does not avoid it. If the Ordinary were to grant administration to the wrong party, and were then to commit it to the right, we think the better opinion is that, even in that case, the latter is not a revocation of the prior grant, but that it must be done by judicial sentence. 1 *Wms. on Exrs.* 390-1.

[6.] We think there was evidence before the jury, besides the bills of sale, of the passing of the title to the slaves from Gazaway Beale to the plaintiff in error. It is true, it was

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slight, but still it was evidence. The possession of the negroes had passed from Gazway Beale to Charles T. Beale. The latter was in possession of them in Burke county, and had paid taxes for them. Simpson testified that he borrowed money from him to finish paying for the negroes. That he paid Gaz. Beale the money, who said that he had paid him all the money, and that it was for the purchase of the negroes. This was *some* evidence. What degree of credence it was entitled to, and whether the force of it was not impaired, and to what extent, by the statements of Charles T. Beale to the same witness, was a question for the jury.

[7.] The counsel for the plaintiff in error, requested the Court to charge the jury, "that if they find that the bills of sale, made by Gazaway Beale to the defendant, were made in fraud, and if Gazaway Beale was a party to the fraud, they are good as against the maker of them, and carry a good title to the defendant, and that in cases of fraud by both parties, the Court will leave them where it found them." The Court refused to give this charge, and it committed no error in refusing it. There is no evidence in the record of a purpose on the part of Gazaway Beale, to perpetrate a fraud upon any one. In every case of fraud, there must be a person to be defrauded, and a subject in respect to which the fraud is to be committed. It cannot be contended that Gazaway Beale intended to perpetrate a fraud on Charles T. Beale, by conveying to him valuable negroes, without consideration. He was not the party to be defrauded. If both parties contemplated a fraud, it must have been contemplated against some one, or a class of persons, as creditors. There was no evidence that Gazaway Beale had creditors prior or subsequent to the transfer of the property, the payment of of whose claims he had manifested a desire to avoid. It was not possible, therefore, that he could have meditated a fraud against creditors. The charge as given, was unnecessary and uncalled for by the facts in proof; but it was certainly erroneous as a principle of law, and inasmuch as the case must go

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back for a new trial, it is proper that we should pass upon it, as the testimony on a future trial may be different. If a party conveys property for the purpose of defrauding creditors, which purpose is to be established by proof sufficient to establish the fraudulent intention, the creditors may avoid the conveyance, but the fraudulent party or his personal representative never can.

[8.] Although the party may die, and the administrator on his estate represents creditors as well as distributees, he can no more move to avoid the deed than the party himself could, were he in life. The creditors may move in the matter, but no one else. In such cases the administrator is estopped by the fraudulent act of his intestate.

[9.] There was no error in the instruction of the Court to the jury, to correct their verdict, and put it in proper form. They were not directed to alter it in matter of substance, nor did they do it.

[10.] It was discretionary with the presiding Judge to allow the jury to be polled, or not. He refused it in this case. Nothing appears in the record, (if this Court considered itself at liberty to control the discretion of the Court in this case,) to show that it was improperly exercised.

[11.] A motion for a new trial was made in the Court below, on all the grounds and points upon which we have passed our judgment above, and on the additional ground, that the verdict of the jury was contrary to law, evidence, and the preponderance of evidence. The motion was refused on all the grounds. The last alone, remains to be considered. We know of no principle of law, to which the facts in proof were applicable, violated by the finding of the jury. It was insisted on the trial of the cause, that the negroes were conveyed in fraud of creditors, and yet there is no proof that the maker of the bills of sale was indebted to any considerable amount, or at all, at the time of their execution, or afterwards. Charles T. Beale said something about securing the property against creditors, but Gazaway Beale was not present, and

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there is a total absence of proof that there were creditors who were never paid. But Charles T. Beale said he intended to secure the property to deceased's wife and children, as deceased was a frolicsome man. If existing creditors had been provided for in an instrument drawn for that purpose, I will say that there might have been no legal objection to it. But instead of securing it to deceased's wife and children, the bill of sale was made to himself. The jury were certainly at liberty to infer from this proof, that Gazaway Beale did not contemplate a fraud upon his creditors, especially as no debts were proven to have existed at that time; and they were equally at liberty to infer, that Charles T. Beale, by suggesting that his habits might lead to future embarrassments, induced Gazaway Beale to make the bill of sale to him. There could have been no fraud in Gazaway Beale, if he had no creditors to defraud; there could have been no fraud on the part of Charles T. Beale against the creditors of Gazaway Beale, if he had none. Hence, if there were no creditors, there was no violation of the rights of creditors; and the finding of the jury, if they believed there were no creditors, that the administrator might recover the negroes, and was not estopped by any proof before them of a meditated fraud upon creditors, was not a violation of the principle of law, enforced in favor of creditors—that as between parties equally at fault in an illegal transaction, the condition of the party in possession is the better condition. The verdict of the jury was not, therefore, contrary to law. In our judgment, it was not contrary to evidence or the preponderance of the evidence. The defendant in the Court below, claims to have purchased the negroes, Matt and Billy Buck, on the 18th of February, 1848, and Martha on the 2d of September, 1861. His bills of sale are of these dates. It was insisted, in the argument before this Court, that there was a subsequent purchase of the slaves by Charles T. Beale. The plaintiff made out his title in the Court below, by proof by Dr. Martin, that defendant (plaintiff in error) said to him in 1850 or 1851, that

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Buck belonged to the deceased; by Day, that the deceased had possession of the negroes when he left Columbia county, two or three years before his death; and by Christian, that he had bought Buck of deceased, on the Friday before his death, and he saw defendant in relation to the trade, who said there was no incumbrance on him; that he hoped he would not buy them, as they were family negroes, and if Gaz was bent on selling them, he would buy them himself; he did not deny the right of Gaz. to sell them, but said the title was in himself. The evidence of title on the part of the defendant was, that about eighteen months before the trial, which took place in October, 1856, he called on Dr. Campbell to treat the negroes for hernia. The bill of sale for the negro men was proven and read in evidence. No money was paid, nor notes given in the presence of the witnesses, but the bill of sale was handed to Gazaway Beale, who was to deliver it on receiving the notes, and he told one of the witnesses, two or three days afterwards, that he had received the notes. The bill of sale for Martha was proven and read in evidence. One of the witnesses testified to deceased's hand writing, and the other to the execution of the bill of sale, but neither of them proved the payment of any consideration. The only remaining evidence to this point, is the evidence of Simrson, that defendant had borrowed money from him to finish paying for two negroes, that the money was paid to the deceased, who said it was for the purchase of the negroes. The jury upon this testimony, had certainly a right to find, and no doubt did find, that the plaintiff had no right to hold the negroes, Matt and Buck, under the bill of sale executed in February, 1848. In 1850 or 1851, he told Dr. Martin that Buck was the property of Gaz. Beale, and when he paid him the note for the hire, he said he was his agent. He told Christian, on the Friday before his death, when he saw him respecting the trade he had made with Gaz. Beale for Buck, that there was no incumbrance on him. If Gaz. was bent on selling them, he said he would buy them himself. He

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did not deny the right of Gaz. to sell them, but said the title was in himself. Roberts testified, that Gazaway Beale wanted to turn the negroes into money, and sold them to Charles T. Beale for that purpose, and yet no money was paid. The witnesses testify that notes were to be given, and that Gazaway Beale said he had received the notes. When Simpson saw the money borrowed from him, paid, no note was given up, and if his testimony applied to the sale of 1848, a note ought to have been given up. But it is evident from Charles T. Beale's admissions, that he claimed no right to the slaves under the bill of sale. Now, in regard to a second sale to be implied from Simpson's evidence, already stated, the jury had a right to draw their own conclusions. The same witness testifies, that he heard plaintiff in error say that Christian wanted to buy one of Gaz's boys. In this conversation he spoke of them as Gaz's boys, and said they were family negroes, and if they were sold, *he would* buy them himself. Now, this was a conversation held, the witness says, when he came to borrow the money to pay the balance due by defendant to deceased for the negroes. The jury were the proper judges of this evidence, and they did judge of it. It seems from the informal verdict first returned by them, that they considered that the plaintiff in error should be allowed the \$500 paid as a part of the hire of the negroes. Dr. Martin had paid him hire, and Henry Dawson did the same thing.

In regard to Martha, the evidence is less complex. There was a bill of sale. A witness saw it executed, but he does not testify that he saw either a note given or the money paid, and yet he says, that he states all he knows in favor of the defendant. Whether he obtained the title to Martha in accomplishment of his expressed purpose to fix Gaz's property, and to secure it to his wife and children, the jury were the judges. He did not probably own Martha at the time that Matt and Buck were conveyed; for Richard B. Day testifies, that he knew Matt and Buck, and *afterwards* deceased had a woman named Martha. We regret that the ground taken

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in the motion for a new trial, makes it necessary to go so fully into the consideration of the evidence. It was unavoidable. We concur with the Court below, that a new trial ought not be granted on this last ground, but reverse the judgment and order a new trial, on the grounds herein specified as errors in the decisions of the Court below.

Judgment reversed

No. 6.—**JULIA ANN WATSON**, by her next friend, plaintiff in error, vs. **WILLIAM WATSON**, defendant in error.

An instrument was substantially as follows: "Know all men by these presents, that I, James B. Carter, for and in consideration of the natural love and affection which I bear unto my children, (naming them,) and for their better preferment in life, and the increase of their portion, and also in consideration of the sum of ten dollars, to me in hand paid by my children at and before the sealing and delivery hereof, the receipt whereof I do hereby acknowledge, have given, granted, bargained and sold, and by these presents, do give, grant, bargain and sell, unto my children, all the property hereafter named, to be equally divided between them at my death, to-wit: (divers negroes,) to have and to hold all of the property hereby given and granted unto them, their heirs, executors, and administrators, forever, as their own property; also, I do hereby appoint my son-in-law guardian for myself and children, during my natural life: Nevertheless, if any of my children should marry or come of age during my life-time, then they are to draw their equal shares of my estate as heretofore mentioned.

In witness whereof, I have hereunto set my hand and seal, this, 12th day of September, 1837.

JAMES B. CARTER, [L. S.]

In presence of
Attest, JAMES S. FULLER,
 JOHN R. STANFORD."

Held, That this instrument was not a will.

In Equity in Richmond Superior Court. Tried before Judge HOLT, at April Term, 1857.

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Upon the trial of this case, complainant offered in evidence the following instrument in support of her title to the property in controversy, to-wit:

GEORGIA, } Know all men by these present, That
 Warren County. } I, James B. Carter, of the aforesaid State
 and county, for, and in consideration of the natural love and
 affection which I bear unto my children—Lazarus Sallis, my
 son-in-law, Martha Jane Carter, Anderson C. Carter, Marcus
 Carter, David Carter, Effe Ann Carter, and Julia Ann Carter,
 and for their better preferment in life and the increase of their
 portion, and also in consideration of the sum of ten dollars
 to me in hand paid by my children above named, at and be-
 fore the sealing and delivery hereof, the receipt whereof I do
 hereby acknowledge, have given, granted, bargained, sold,
 and by these presents do give, grant, bargain and sell, unto
 my children above named, all the property hereafter named,
 to be equally divided between them at my death by three
 disinterested ("persons") which is as follows, to wit:—one
 negro man named Doss, one named George, Joe, Patrick,
 Moses, Jeremiah, one negro woman Vilet, one Huldah, one
 by the name of Peter, one named Juda, one girl named Eaba,
 one man by the name of Jared: To have and to hold, all
 and singular the property hereby given and granted unto the
 above named children, their heirs, executors, and administra-
 tors forever, as their own proper property; also I do hereby
 appoint Lazarus Sallis, my son-in-law, Guardian for myself
 and children, during my natural life: Nevertheless, if any of
 my children should marry or come of age during my life
 time, then they are to draw their equal shares of my estate
 as heretofore mentioned.

In witness whereof, I have hereto set my hand and seal,
 this the twelfth of September, one thousand eight hundred and
 thirty-seven.

JAMES B. CARTER, [L. S.]

In presence of
Attest, JAMES S. FULLER,
 JOHN R. STANFORD.

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GEORGIA, } Before me, personally came John R. Stan-
 Warren County. } ford, and after being duly sworn, saith that
 he saw James B. Carter sign, seal, and deliver the within in-
 strument of writing, for the purposes therein mentioned, and
 that James S. Fuller was a subscribing witness with himself.

JOHN R. STANFORD.

Sworn to and subscribed before me this Sept. 15, 1837.

Q. L. C. FRANKLIN, *J. J. C.*

Recorded 15th Sept., 1837.

JOHN MOORE, *Clerk.*

To which being admitted in evidence, counsel for defen-
 dant objected on the ground that the paper was not a deed,
 but a testamentary paper, and had not been probated and ad-
 mitted to record in the Court of Ordinary. After argument
 had, the Court sustained the objection, and excluded the in-
 strument. To which decision counsel for complainant ex-
 cepted, and now assigns said ruling as error.

MILLERS & JACKSON; and E. H. POTTLE, for plaintiff in
 error.

GOULD, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the instrument made by James B. Carter, a will, or a
 deed? The Court below held that it was a will.

An instrument is a will, if it is not to take effect until after
 the death of its maker; a deed if it is to take effect before his
 death.

Whether an instrument is to take effect before the death of
 its maker, or not until afterwards, depends on his intention.
 If his intention is, that the instrument shall take effect before
 his death, the instrument will take effect before his death;
 if his intention is, that the instrument shall not take effect
 until after his death, the instrument will not take effect until

after his death. This will be so, provided, that there is not something in the law, to say, that the instrument shall not take effect according to the intention of its maker.

In respect to the present instrument—whether the intention of its maker was, that it should take effect before his death, or not until afterwards—there is nothing in the law to say, that the instrument should not take effect according to that intention.

The *words* of an instrument are what we are mainly to regard, when we set about seeking what its author's intention was in making the instrument; and those words are to be taken in their usual acceptation, unless there is some extraordinary reason forbidding them to be so taken.

There does not appear to be any extraordinary reason why the words of this instrument should not be taken in their usual acceptation.

The *form* of an instrument also, may help to indicate the intention of its author.

The words and the form may both point the same way: whenever they do, there can hardly be a doubt, that that is the way to go to find the intention.

Now, the words of this instrument, taken, as they must be, in their usual acceptation, show an intention in the maker of the instrument to do an act that was to have effect before his death.

“I, James B. Carter,” “have given, granted, bargained, sold, and by these presents, do give, grant, bargain and sell,” words found in this instrument, are words which, if taken in their usual acceptation, express a gift *to arise immediately* on their utterance. They are words which do this with emphasis, when preceded, as these are, by such words as the following—“and also in consideration of the sum of ten dollars to me in hand paid,” “at and before the sealing and delivery hereof, the receipt whereof I do hereby acknowledge,” and when followed by such words as these, “to have

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and to hold all and singular the property hereby given and granted unto" &c. "forever as their own property."

"Nevertheless, if any of my children should marry or come of age during my life-time, then they are to draw their equal shares of my estate as heretofore mentioned." These are the last words of the instrument. And unless the intention of the maker of the instrument was such, that the instrument should, or might, take effect during his life-time, these words are absurd, not to say contradictory of the other words contained in the *instrument*. But if his intention was such, that the instrument should or might take effect during his life-time, the words are sensible, and they are consistent with all the other words of the instrument; and they are reasonable too, as they add a natural provision to the instrument.

The same thing, for the most part, is to be said of the provision expressed in these words: "Also I do hereby appoint Lazarus Sallis, my son-in-law, guardian for myself and children, during my natural life." True, this provision may be void of itself; but then even a void provision in an instrument, may serve as some index of intention.

Consulting, then, the *words* of this instrument, the conclusion to which we must come, is, that it was the intention of the maker of it, James B. Carter, that it should take effect before his death.

What says the form of the instrument?

The form of the instrument is that of a deed, and not that of a will: "Know all men by these presents;" "in consideration of the sum of ten dollars" "paid," "before the sealing and delivery hereof;" "to have and to hold;" "in witness whereof, I have hereunto set my hand and seal;" these are all features appropriate to a deed, and not features appropriate to a will.

The form of the instrument being that of a deed, and a deed being an instrument to take effect before the death of its maker, the *form* helps the *words*, in the matter of showing

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that it was the intention of the maker of the instrument, that it should take effect before his death.

The words, and the form, then, concur in saying, that this was his intention: a part of the words would be absurd, and void, if this were not his intention.

This being so, the conclusion must be, that this was his intention. But if this was his intention, then the instrument was not a will, it was a deed.

We think, therefore, that the instrument was not a will, but was a deed.

In this opinion, we are more or less supported by, *Cumming vs. Cumming*, 3. *Kelly* 484; *Jackson vs. Culpepper*, do. 569; *Spalding vs. Grigg* 4. *Ga.* 84; *Robinson vs. Schley*, 6. *Ga.* 526; *McGlawn vs. McGlawn*, 17. *Ga.* 234; and are not, as I think, opposed by *Dudley vs. Mallory*, 4. *Ga.* 52; *Crary vs. Rollins*, 8. *Ga.* 450; *Simms vs. Arnold*, 10. *Ga.* 506; *Wellborn vs. Weaver*, 17. *Ga.* 275; or by any other case.

It is true, that in this instrument there is to be found this language; "have given," &c., and "do give," &c., "unto my children above named, all the property hereafter named, to be equally divided between them at my death."

But the words "at my death," refer to the time when the *division* of the property among the children was to take place; not to the time when the *title* to the property was to vest in the children. Such would have been the case, even if the words had been, "to be paid," or delivered, at my death, instead of being merely, "to be divided" at my death. "When a legacy is given to a person *to be paid*, or *payable* at, or when he shall attain the age of twenty-one, or at a future *definite* period, the *interest* in the legacy shall be considered to be vested in the legatee immediately upon the testator's death, as *debitum in presenti solvendum in futuro*, the *time* being annexed to the *payment*, and not the *gift* of the legacy." 1. *Rop. Leg.* 376.

Suppose the words had been, not "at my death," but at the death of *A. B.* Can there be a doubt, that the gift would

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not have vested in the children before the death of A. B. ? and between "at *my* death," and "at the death of *A. B.*," what is the difference? "If at the death of *A. B.*," would not prevent the gift from vesting before the death of A. B., why should "at my death," prevent the gift from vesting before my death.

This instrument is such, that it will be good, whether considered as a will, or as a deed. It, unquestionably, has the *form* of a deed. To make it a will, therefore, we should have to do violence at least to its form. But what reason is there to justify us in doing violence, even to so unimportant a thing as its form? It will be equally good if we respect its form, and say it is a deed. In short, there is no room in this case, for the maxim, that words may be strained, if straining them is necessary, *ut res magis valeat quam pereat*.

There ought to be a new trial.

Judgment reversed.

NO. 7.—THE BANK OF SAVANNAH, plaintiff in error, vs. THE PLANTERS BANK, et al., defendants in error.

[1.] If an insolvent debtor, preferring one creditor to the others, divides the debt which he owes to that creditor, into smaller debts, so that they shall be within the jurisdiction of a Court in which a judgment may be obtained on them that shall be such as to give that creditor an advantage over the others, the debtor does what is not unlawful.

[2.] The Act of 1820, "to regulate the mode of prosecuting actions against contractors and copartners, in certain cases," applies to the city Court of Savannah.

Motion to distribute Funds, in Chatham Superior Court.
Decision by Judge FLEMING, May Term, 1857.

Statement of facts agreed upon by counsel.

The plaintiffs brought their action in Chatham Superior Court against the defendants as co-partners—Heman A. Crane and Lewis W. Wells acknowledging service in Chatham county, and Richard Curd, the third co-partner, acknowledging service on second original sued out for Bibb County—and at the present term obtained judgment for \$10,000. Summons of garnishment was served on Scranton, Johnson & Co., and they now bring into Court, under their return, \$3,440.

After suit brought and garnishment served as above stated, the defendants being indebted to the Planters Bank, and the Merchants and Planters Bank, each in large sums of money, with the knowledge and consent of said Banks, divided the debts into sums of \$500 each, so that suits could be brought on them to the city Court of Savannah, and judgments obtained at the then next term of said Court; on the 14th of January, 1857, they gave their promissory notes, payable one day after date, to their own order, and by them endorsed and delivered to said Banks for the amount of their indebtedness. On the 19th of January, the said Banks being the real owners, but using the name of Hiram Roberts, Isaac W. Morrell, G. Foote, Hugh W. Mercer, George W. Wylly, George W. Anderson, and the Planters Bank of the State of Georgia, brought seven several suits to the February Term, 1857, of the city Court of Savannah, describing the co-partners, Heman A. Crane, Lewis W. Wells, and Richard Curd, as of said city, the two former being actually residents of Savannah, but the said Richard Curd, being then and at the time of suit brought by the Bank of Savannah, a citizen of Georgia, resident in Bibb County, though not known to be so by the Banks last suing. On these suits Heman A. Crane and Lewis W. Wells acknowledged service in person and a return was made by the Sheriff of the city Court that Richard Curd was not to be found in his bailiwick:—judgments were rendered on said seven suits, February 2d, 1857, to bind the individual property of Heman A. Crane and Lewis W. Wells,

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and the co-partnership property of Crane, Wells & Co. It is admitted that these suits were brought in the city Court, with reference to the fund which had been stopped by Garnishment, and for the purpose chiefly of claiming this fund by prior judgments; but the judgments were founded upon *bona fide* debts, intended to bind all the property of the defendants according to law, and to be used and controlled by the plaintiffs without any reservation whatever. The fund paid in by the Garnishees is now claimed by these judgments.

Upon this statement of facts the question of distribution is submitted to the Court, with leave to either party to carry up.

LLOYD & OWENS,
Attorneys for Bank of Savannah
 LAWTON & BASINGER,
Attorneys for other parties.

The facts being thus agreed upon and submitted, the presiding Judge decided that the judgments obtained in the city Court were good, and being of prior date to the judgment of the Bank of Savannah, took the whole fund to the exclusion of that judgment, and ordered the same to be distributed and paid out accordingly.

To which order and decision the Bank of Savannah excepted.

LLOYD & OWENS, for plaintiff in error.

LAWTON & BASINGER, for defendants in error

By the Court.—BENNING, J. delivering the opinion.

The question is, which ought to have the money, the Bank of Savannah, or the Planters Bank, and the Merchants and Planters Bank?

There is no question, that it is the latter that should have the money, if their judgments are valid.

Are their judgments valid?

The judgments are for \$500 each; and each of them is founded on a note of \$500. The common debtor, Crane, Wells & Co. owed each of these two Banks, a debt much exceeding \$500. These two large debts, the two Banks and Crane, Wells & Co., divided into smaller debts, viz: debts of \$500, and it was to secure these smaller debts, that the notes aforesaid, on which the judgments are founded, were given.

This division of the two large debts was made *after* service of the garnishment issued by the Bank of Savannah, and was made in order to enable the other two banks to sue in the City, and thus to enable them to get judgments *before* the Bank of Savannah could get a judgment. In short, the division was made because the common debtor *preferred* his creditors—the Planters Bank, and the Merchants and Planters Bank—to his creditor, the Bank of Savannah.

Is such a preference lawful? If so, it cannot be a cause of rendering the judgments of the two former Banks invalid.

By the *old* law debtors might make preferences, among their creditors, without limit. Therefore, by the old law, debtors might make such a preference as that made by this debtor.

All of the old law, except such as may have been repealed, is still in force.

The twenty-seventh section of the Judiciary Act of 1799, is as follows: "No confession of judgment shall hereafter be entered up, but in the county where the defendant or defendants may reside, or unless the cause has been regularly sued out and docketed in the usual way as in other cases, nor until such cause be called in its order for trial."

This section, doubtless repeals a part of the old law; but it does not repeal the part which sanctions such a preference as that in question in the present case; for it does not *say* that

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it repeals that part, and it is not *necessarily repugnant* to that part.

The same may be said, *mutatis mutandis*, of the Act of 1818, to prevent insolvent debtors from making "*assignments or transfers of property*," to a portion of creditors to the exclusion and injury of the other creditors."

Neither this Act then, nor the twenty-seventh section of the Judiciary Act, repeals that part of the old law, which sanctions the preference made by this debtor.

It was not insisted, that there is any other law, that does.

It follows, therefore, that that part of the old law is still in force.

And such is the conclusion to which this Court came, in *Lavender et al. vs. Thomas et al.* 18 Ga. 668.

[1.] There is nothing, then, in this *division of the large debts*, to render the judgments invalid.

These judgments were judgments rendered by the City Court of Savannah. The judgments were rendered in suits brought against a partnership, consisting of three persons, Crane, Wells and Curd. Of these persons, Crane and Wells resided in Savannah, and they acknowledge service of the suit; Curd resided in Macon, and as to him, the Sheriff returned that he was not to be found in his bailiwick. The judgments were against the individual property of Crane & Wells, and against the property of the partnership.

Did the fact that Curd resided out of the city of Savannah, and was not served, render these judgments invalid?

It did not, if the Act of 1820, "to regulate the mode of prosecuting actions against contractors and copartners, in certain cases," applies to the city Court of Savannah. This is admitted.

Does that Act apply to the city Court.

It is sufficiently general in its terms to apply to that Court.

It is a highly remedial Act.

It certainly, therefore, ought as well to apply to that Court.

as to any Court, unless there is some special cause to prevent it from applying to that Court.

We know of no such cause.

There is a fact which, perhaps, may be a cause why the Act should especially apply to that Court. The city Court of Augusta is, in all respects, a similar Court to the city Court of Savannah. The city Court of Augusta was organized by an Act passed in 1817; and therefore, passed *before* this general Act of 1820. In that organizing Act, there is provision made for the city Court of Augusta, *similar to the general provision* contained in the Act of 1820. Indeed, the provision in the Act of 1820, was, it is probable, taken from that contained in that organizing Act.

Now, the city Court of Savannah was organized by an Act passed *after* the Act of 1820. That Court, being like the city Court of Augusta, as much needed a provision of this sort as the city Court of Augusta could need it. Why then was it not specially given to that Court in the organic Act in the same way in which it had been given to the city Court of Augusta in its organic Act? There was at that time, no necessity that it should be so specially given: the general provision contained in the Act of 1820, then existed: That sufficed. What other answer than this can there be?

And this answer corresponds with what, no doubt, has been the contemporaneous view of the remedial powers of the city Court of Savannah.

[2.] We may at least say, that we know of no special cause sufficient to take the city Court out of the general terms of the Act of 1820.

But if there is no such cause, then there is nothing in the fact aforesaid, as to one partner's non-residence and non-service, that can render the judgment invalid.

But even if it were so, that the Act of 1820 did not apply to the city Court, would it follow, that these judgments are void?

That it would, is anything but certain.

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The two served defendants made no objection to the want of service on the third : they suffered judgment to go against them.

If two out of three partners, or joint contractors, are *sued*, the common law says, that they must plead the non-joinder of the third, else judgment may of right go against them. But if all three are sued, and only two *served*, can it make any difference? Must it not be equally true, that the two must plead, or at least in some way insist upon, the non-service of the third, in order to prevent judgment from going against them?

And the common law is what governs, in this respect, in the present case. The part of the Constitution relating to the place in which cases are to be tried, does not apply to corporation Courts.

Upon the whole, we may say that we know of nothing that should render these judgments void.

So the judgment of the Court below is to be affirmed.

Judgment affirmed.

No. 8.—MATTHEW W. BUNN, adm'r, plaintiff in error, vs. MOSES L. BUNN, et al. defendants in error.

An instrument was in substance as follows: This indenture made this 1st April, 1845, between Civility Bunn of the one part, and Mathew W. Bunn of the other, witnesseth, that said Civility, in consideration of her love for her son said Mathew, and of five dollars to her in hand paid by him, has given, and granted, and does by these presents, give and grant, to said Mathew, all that tract of land lying, &c., one negro Matilda, one negro Edmund, one negro Rhody, and all of her stock, plantation tools, and household and kitchen furniture; and that she reserves to herself her right to said property during her life; and that after her death, said Mathew is to have and to hold the said property, to him, his heirs and assigns, forever, in fee simple; and that she warrants the property to said Mathew, against herself, and against all other persons whatever.

Held, That this instrument was not a will, but was a deed.

Bunn, adm'r vs. Bunn, et al.

In Equity, in Burke Superior Court. Decision by Judge HOLT, at May Term, 1857.

This case was heard upon bill and answer. The facts and legal questions are sufficiently set forth in the bill of exceptions, which is as follows:

Mathew W. Bunn, administrator, &c., of Civility Bunn, plaintiff in error.

vs.

Moses L. Bunn, and Pleasant Pryor in right of his wife, Sarah, and the said Sarah, formerly Sarah Bunn, by her next friend and husband, the said Pleasant Pryor, defendants in error.

From the Superior Court of Burke County.

Be it remembered, that the above named defendants in error, filed their bill on the equity side of the Superior Court of Burke County, against the above named plaintiff in error—which said bill, returnable to November Term, 1855, of said Court, called upon the said Mathew W. Bunn for an account of the estate of his said intestate. The answer of said Mathew W. Bunn was duly filed, alleging that he had fully accounted with complainants for all their distributive shares of his intestate's estate, and insisting that all the lands, goods, and chattels set forth in complainants' bill and charged to be a part of his intestate's estate, and which had not been by him accounted for, were the individual property and effects of him the said Mathew W. Bunn, and that he claims the same under an instrument in writing made by said Civility Bunn, a copy of which was annexed to his said answer, and which is in the words and figures following to-wit:

Bunn, adm'r vs. Bunn, et al.

GEORGIA, } This Indenture, made the first day of April,
 Burke County } in the year of our Lord one thousand eight
 hundred and forty-five, between Civility Bunn, of said coun-
 ty and State, of the one part, and Mathew W. Bunn, son of
 the said Civilty Bunn of the same place, of the other part,
 witnesseth, that the said Civility Bunn, for and in considera-
 tion of the natural love and affection which I have, and bear
 to my said son Mathew W. Bunn, and for and in considera-
 tion of the sum of five dollars cash in hand paid by the said
 Mathew W. Bunn, the receipt whereof is hereby acknowl-
 edged, have given and granted, and do by these presents give
 and grant unto the said Mathew W. Bunn, his heirs and as-
 signs, all that tract of land situate, lying and being in the 74th
 district of the county of Burke, the place whereon I now re-
 side, containing five hundred and sixty acres, be the same
 more or less, one negro woman a slave by the name of Ma-
 tilda aged about forty years, one negro boy Edmund aged
 seventeen years, a negro girl Rhody aged fourteen years, with
 all of my stock of every name and description, plantation
 tools, household and kitchen furniture. I, Civility Bunn, re-
 serve to myself my right to said described property during of
 my life, after which Mathew W. Bunn to have and to hold
 the afore described property to him, his heirs and assigns
 forever, in fee simple. And the said Civility Bunn for herself,
 her heirs, executors and administrators, the said given and
 granted property unto the said Mathew W. Bunn, his heirs
 and assigns, will warrant and forever defend the right and
 title thereof, against themselves, and against the claim of all
 other persons whatever.

In testimony whereof, the said Civility Bunn hath hereun-
 to set her hand and affixed her seal, the day and year first
 above written. CIVILITY BUNN, [L. S.]

Signed, sealed and delivered in presence of us.

Interlined before signed.

JOHN C. C. LANE, J. P.

JOHN T. BROWN.

Bunn, adm'r vs. Bunn, et al.

At November Term, 1856, an order of Court was passed, of which the following is a copy, after stating the case :

“ The answer of the defendants having been duly filed, parties consenting : *It is ordered*, That the legal points involved in said cause, namely, whether the deed (a copy of which is annexed to defendants' answer,) from Civility Bunn to defendants, is a deed or testamentary in its nature, and whether or not a subsequent deed executed by the said Civility Bunn to A. Porter, Trustee, and witnessed by the defendant, is admissible as evidence to show, that said paper was not intended as a deed, but was intended to be a will?—be argued at chambers, with the right to either party dissatisfied with the decision, within thirty days after such decision is made, to except to the same.”

After argument, the Court took time to consider, and at May Term, 1857, of said Court, rendered its decision holding said instrument to be a will.

Whereupon, the said Mathew W. Bunn excepted to said decision, and now within thirty days of its rendition presents this his Bill of Exceptions, and prays that the same may be certified according to law.

MILLERS & JACKSON, for plaintiff in error.

JONES & STURGES, for defendants in error.

By the Court.—**BENNING J.** delivering the opinion.

Was the instrument made by Civility Bunn, a will, or a deed? The Court below held that it was a will.

We think it was a deed. If it differs in any essential respect from the instrument in the case of *Watson vs. Watson*, decided at this Term, the difference does not make in favor of its being a will.

It is true, that in that instrument, the last clause was one which contemplated a division of the property in the lifetime of the author, as a possibility ; but it is also true, that

Hand, Williams & Co. vs. Sample.

in this instrument, the last clause is a clause of warranty; and a clause of warranty is, perhaps, as incompatible with what is a will, as such a clause as that is.

Then, in *this* instrument there is a disposition made of *land*, and the instrument has but two witnesses to it. To say that this instrument is a will therefore, is to say that it shall be *void* so far as this disposition is concerned. And if it be true, that we are at liberty to strain an instrument, when by straining it we can prevent it from being void, how much more true must it be, that we are not at liberty to strain an instrument, when by straining it we render it void.

Referring to *Watson vs. Watson*, decided at this term, we say, that we think, that the Court below erred in holding this instrument to be a will.

A new trial, therefore, must take place.

Judgment reversed.

No. 9.—HAND, WILLIAMS & Co., plaintiffs in error, vs. GREENVILLE & SAMPLE, defendants in error.

[1.] A Sheriff after having retired from office may be ruled.

[2.] But he cannot move to re-instate a case to which he is no party, which has been dismissed by the Court.

Assumpsit, in Chatham Superior Court. Decision by Judge FLEMING, at May Term, 1857.

The plaintiffs, Hand, Williams & Co., sued out bail process in assumpsit against Charles E. Greenville and William T. Sample, partners in trade, under the firm of Greenville & Sample, for the sum of \$635 36, alleged to be due on account, to which was attached an affidavit for bail.

Head, Williams & Co. vs. Sample.

The Sheriff arrested Greenville, who gave bond with M. J. Reily surety, for his appearance, &c., and made the following return:

"GEORGIA, CHATHAM COUNTY,
Sheriff's Office, May 15th, 1855. }

I have arrested Charles E. Greenville, one of the defendant's, and served him with a copy of the within, and taken bond in terms of the law.

A. THOMAS, *Sheriff, C. C.*"

No mention or return was made as to the other defendant, Sample. Upon the call of the case for trial, defendant's counsel moved to dismiss the action, on the ground that the service and return made by the Sheriff was illegal. The Court granted the motion and dismissed the suit.

Afterwards, at the May Term, 1857, of Chatham Superior Court, the plaintiffs, by A. H. H. Dawson, their attorney, made a motion to set aside the order dismissing the cause, and to reinstate the same on the docket, and to grant leave to the said Sheriff to amend his return.

Thomas who had executed the process and made the return, had gone out of office, and he was not Sheriff at the time this motion was made to allow him to amend the return.

Judge FLEMING refused the motion to amend, and ordered the suit to be dismissed, and the bail to be discharged. Counsel for the plaintiffs excepted.

A. H. H. DAWSON, for plaintiffs in error.

GORDON, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

The motion made by the late Sheriff to reinstate the dismissed case, and amend his return thereto, was refused by the presiding Judge, because, having gone out of office, he was not subject to the rule of the Court, and the cases of

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Hopkins vs. Burch, 3. *Kelly* 225, and *Jessup vs. Gragg*, 12. *Ga. R.* 263, are relied on as precedents. Those were cases of constables.

[1.] It was certainly the duty of the Sheriff to have made the return to the petition and process as to the party not served. It was the plaintiffs right to have it, and if he refused to make it, he was unquestionably subject to be ruled. The Act of 1813, *Cobb*, 202, declares that "all Sheriffs, Coroners and Clerks, of any of the Courts of this State, shall at any and all times be subject to the order and rule of said Courts, after they have retired from their respective offices, in such cases and in like manner as they would have been had they remained in office." This act continues him in office, so far as to subject him to rule, at the instance of any party whom, by official negligence or misconduct, he may have injured, and all acts which he does by order of the Court he performs under his official obligation.

[2.] But that was not the question in this case. The Sheriff moved to re-instate a case which had been dismissed by order of the Court, and to amend his return.

He was no party to the suit. The case was out of Court, and he had no right whatever to move in it.

The judgment of the Court below must be affirmed.

No. 10.—JOHN MCPHERSON, plaintiff in error, vs. THE STATE, defendant in error.

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[1.] Dying declarations of *belief*, are not admissible as evidence.

[2.] The jury being the judges of the law, and the fact, are not bound to go by the charge which the Court makes, as to what is the law, unless the charge truly states what the law is; and whether the charge does that or not, the jury have the *right* to decide.

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- [3.] Although a witness may be impeached, and may not afterwards be corroborated, yet, it must be a question for the jury, whether he is not still to be believed, notwithstanding the impeachment.
- [4.] A threat made by a man when under excitement, is not of as much weight, as one made by him when not under excitement; but the difference in the weight of the two threats, is a question for the jury, not for the Court
- [5.] If a threat is *equally* susceptible of two constructions, the one in favor of the hypothesis of innocence, is the one that ought to be adopted.
- [6.] If a man, though intending to commit an unlawful act, abandons his intent to do so, and afterwards by accident kills a man, the killing is not murder; nor is it involuntary manslaughter in the commission of an *unlawful* act.
- [7.] Notice to A. cannot, in general, operate against B., so as to make B. *criminal*, unless the notice has come to B's knowledge.
- [8.] The owner has the right to shoot a person who is a burglar, or a person whom, on sufficient grounds, he believes to be a burglar; and the person seizing the owner's gun to prevent being shot, does not deprive the owner of this right, unless the person surrenders himself.

Murder, in Appling Superior Court. Tried before Judge COCHRAN, at May Term, 1857.

John McPherson was indicted for the murder of James Carter. The killing took place in the county of Appling, on the night of the 22d January, 1857.

The prisoner pleaded not guilty. After the testimony was closed, and the charge of the Court given, the jury retired and returned a verdict of involuntary manslaughter in the commission of an unlawful act.

The prisoner moved for a new trial; which motion the Court refused, and his counsel thereupon excepts, and tenders his bill of exceptions.

The substance of the evidence, and all the grounds of exception, are so fully stated and set out in the decision of the Court, that it is unnecessary to re-state them here.

The facts of the case, and the legal questions made and adjudicated, will fully appear from the following opinion.

GAULDEN, for plaintiff in error.

SOLICITOR GENERAL & T. T. LONG, for the State.

By the Court.—BENNING, J. delivering the opinion.

The substance of the testimony in this case, it being a murder case, seems to have been as follows :

On the 22d of January, 1857, a number of persons were at McPherson's (who was the party indicted,) to assist him in moving a house. Among them were Carter, Spence, and Leggett; Carter being the man killed. At some time in the day, two gallons of liquor were procured, a part or the whole of which, was drunk up by the company. The drinkers became much excited, if not intoxicated, by the liquor, and, in consequence, behaved themselves in a noisy, rude, and disorderly manner. The job of moving the house was finished sometime before night. The company had dinner, and the dinner was at a late hour. The company did not leave after dinner. McPherson went to bed. The company still stayed. They "danced about;" they sang; some of them overturned a bench to the hazard of a child; two of them, Spence and Leggett, an hour and a half or two hours in the night, went into the smoke-house to get something to eat, first having told Mrs. McPherson that they intended to do so, to which she made no reply. Whilst in the smoke house, they made a noise—a board fell. The noise attracted the attention of McPherson; he got out of bed, remarking, that "he would kill some of them;" took down his gun, and went into the yard. Spence and Leggett hearing his threat, and hearing him take down his gun, ran out of the smoke house, Spence ahead. McPherson was then in the yard. Spence ran by him, and as he did so, McPherson snapped his gun at him.

It does not appear that Mrs. McPherson communicated to Mr. McPherson what Spence and Leggett had told her. The night was dark, clear and cold. Carter was standing in the dark when shot.

What happened then, was, according to the testimony of the State, this: Leggett, who was running close behind

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Spence, when the gun snapped, caught the gun about mid-way of the barrel and asked McPherson "what in the world he meant?" To which McPherson replied, "what in the hell were you in the smoke house for?" McPherson ran back, holding the gun, and "kept jerking" it, until he got one step on the door. He "kept jerking" it, and then it went off and killed Carter, who was standing off in the yard.

Leggett, (one of the State's witnesses,) swore that he caught the gun to keep McPherson from shooting him; and that McPherson tried to take the gun away from him; that he was not "jerking" the gun, but that McPherson was; that he was holding on to the gun, to keep McPherson from shooting him; that when he caught hold of the gun, McPherson was five or six feet from the door.

But, *according to the testimony of the accused*, what happened then was this; McPherson said, "if you dont keep out of my smoke-house, I'll show you." Leggett said, "I'll break your damued head with the gun." When Leggett took hold of the gun, McPherson was going into the house, one of his feet being on the door block, and the other on the plank. Leggett was trying to get the gun away, and gave it a "jerk." McPherson fell up against the house, and the gun went off."

Several witnesses for the State swore, that they would not believe the witnesses for the accused.

A new witness or two for the accused swore, that they would believe the witnesses for the accused.

The counsel for the accused requested the Court to charge:

1st. That "the jury are the judges of the law and the facts, and are not bound by any charge that the Judge may give."

"2d. That McPherson must have intended to kill some one at the time the gun fired. There must be a co-operation of act and intention to constitute a crime."

"3d. If they believe it to be accidental and not intended by prisoner, the prisoner should be acquitted."

"That the witnesses who were attempted to be discredited,

are still competent, and the jury may or may not believe them."

4th. "That unless the jury are satisfied beyond all reasonable doubts that the firing of the gun which resulted in Carter's death, was the voluntary and individual act of defendant, done with the intention of killing Carter, or some other person, then they ought to find the defendant not guilty."

"5th. That if the jury believe from the evidence, that if the firing off of the gun was occasioned by the struggle between the defendant and Robert Leggett for the gun, they ought to find the defendant not guilty."

"6th. That if the jury believe from the evidence, that the firing of the gun when Carter was killed, was not intended by defendant, but that the gun went off by accident, then they should find the defendant not guilty."

"7th. That if the jury believe that the killing of the deceased was the result of misfortune or accident, unaccompanied with any evil design or intention on the part of the defendant to kill any one when the gun went off, then the jury should find the defendant not guilty."

"8th. That if the jury should believe that the firing of the gun was the voluntary act of the defendant, still if it was fired off without any actual intention on the part of the defendant to kill Carter, or any one else, then the jury ought to find the defendant not guilty."

"9th. That a threat made under excitement, no matter from what cause this excitement emanated, will not authorize the jury to presume that an act done after that threat was made, was deliberately done, and that a threat which accused would not have made in his cooler moments, or made under excitement of any kind, is entitled to but very little weight."

"10th. That where a threat is proven to have been made which is susceptible of two constructions, the one an innocent, the other a criminal construction, that it is their duty to give the threat that construction most favorable to the prisoner."

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Of these requests the Court refused the 1st, the first part of the 3d, the 4th the 5th, the 6th, the 8th, the 9th, and the 10th: granted the 2d; granted the last part of the 3d, but with the addition," that they are competent" (the witnesses impeached) "and may be believed if corroborated;" and granted the 7th, but granted it with "comments." What the comments were does not appear.

The Court then gave the following charge to the jury:

"That if the prisoner went out of his house with a riotous intent of killing Spence, or any one else, and was foiled in this, and any one else was killed by him, though he did not intend it, that he was guilty; that if Spence and Leggett went into the smoke-house with notice to Mrs. McPherson, the prisoner's wife, prisoner had no right to use a deadly weapon on them, it being at most, a trespass.

"That if Leggett took hold of the gun to protect himself, he had a right to do so, and if the consequences were fatal to Carter, prisoner was guilty. And that if the prisoner did not intend to kill Carter, but went into the yard with evil design towards Spence and intended to kill him, still he was guilty.

"If you believe from the testimony that prisoner was in the pursuit of a lawful act, and did not use due caution and circumspection he is guilty of involuntary manslaughter."

The jury found the accused guilty of involuntary manslaughter in the commission of an unlawful act.

The accused then moved for a new trial, and on the following alleged grounds:

- 1st. That the verdict was contrary to the evidence.
- 2d. That the verdict was contrary to the law.
- 3d. That the verdict was contrary to the charge of the Court.
- 4th. That the Court erred in its charges and its refusals to charge.

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5th. That the Court erred in ruling out the dying declarations of the deceased, which went to show that he said that he, deceased, did not believe that prisoner did intend to hurt him.

6th. That the whole charge to the jury was wrong.

7th. That from the tenor of the Judge's charges an intimation was given of what the Judge thought was proved.

The Court overruled the motion for a new trial.

The accused excepted to the judgment overruling the motion for a new trial; and he assigns, as errors, that judgment, the charges given, the charges refused, and the rejection of the dying declarations of Carter, the person killed.

Was the Court right in rejecting the testimony offered as to the dying declarations of Carter.

[1.] We think so. The "*belief*" of Carter could not be entitled to more respect than that to which the belief of a witness is entitled.

As to the *requests*: Is it true, that "the jury are the judges of the law, and the facts, and are not bound by any charge that the Judge may give?"

The 16th section of the 14th division of the Penal Code, is as follows: "On every trial of a crime or offence contained in this code, or for any crime or offence, the jury shall be judges of the law, and the fact, and shall in every case give a general verdict of "guilty," or "not guilty," and on the acquittal of any defendant or prisoner, no new trial shall on any account be granted by the Court."

"*Judges of the law and the fact*;"—Can the word *judges*, have one meaning, when taken in connection with the words, "*of the law*," and another, and a greater meaning, when taken in connection with the words, "*and the fact*?" I am not able to see how it can. That it must have the same meaning, when taken in connection with the one set of words, that it must have when taken in connection with the other, seems to me most manifest.

But the meaning which the word has, when taken in connection with the words, "*and the fact,*" is, at least, that the jury shall have the *right* to decide for themselves what the facts are.

Does it not follow, then, that the meaning which the word has, when taken in connection with the words, "*of the law,*" must be, that the jury shall have the *right* to decide for themselves what the law is. I think so. See *Ricks vs. The State*, 16 *Ga. Rep.* 603. *Holder vs. The State*, 5 *Ga. Rep.* 441.

Suppose, however, the Court give a charge, which truly states the law, are not the jury bound to go by the charge? Certainly they are; but the reason why they are, is not that the charge is the act of the Court, but that the charge truly states the law. In such a case, it is, perhaps, hardly proper language to say, that it is the *charge* by which the jury are bound. What they are bound by, is the *law*; but that happens to be contained in the charge.

Practically, however, the difference between being bound by a charge which truly states the law, and being bound by the law which the charge truly states is not material.

[2.] Hence we do not say that the Court was wrong in refusing the request; it being a request, in one of its parts, that the Court would tell the jury, that they were not bound by *any* charge that the Court might give. If the request had been, that the Court would tell the jury, that they were not bound by any charge of the Court, unless the charge truly stated the law; and that whether the charge truly stated the law or not, they had the right to decide for themselves: we think the request would have been one that ought not to have been refused.

There is a check upon this extensive power of the jury: the Court can veto the verdict, and grant a new trial. I do not know of any other.

The first part of the third request, leaves out of view all the law relating to involuntary manslaughter. But that is

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the law most applicable of all to the case. The Court, therefore, was right in refusing this part of the request.

The latter part of this request was, for the Court to say, that the witnesses whom there was an attempt to impeach, were "still competent." This part the Court gave, but, with the addition, that the witnesses might be believed, if corroborated. In this addition, is contained an implication, that the witnesses, if not corroborated, were not to be believed.

But suppose impeaching witnesses themselves to be entitled to no credit, what then does their testimony amount to? Nothing: And therefore, in such case their testimony does not weaken the testimony of the impeached witness; but if their testimony does not weaken his, it does nothing requiring his to be corroborated.

[3.] Although, therefore, a witness may be impeached by other witnesses, and may not be afterwards corroborated, yet, it must be a question for the jury, whether the impeachment has been successful, and therefore, whether the witness is not to be believed, notwithstanding the impeachment.

If this be true, as we think it is, it follows that the Court erred in adding what it did to this second part of the request.

As to *the fourth, the fifth, the sixth, and the eight* requests; the same may be said of them, that was said of the first part of the third.

As to the seventh—not being able to know what the "comments" were, we cannot tell whether there was any error in them or not.

[4.] If the *ninth* request had been, that the Court would tell the jury that a threat made by a man when excited, is not to have *as much* weight, as a threat made by the man when cool, the request would, doubtless, have been a proper one.

But the question, as to *how much less* is to be the weight, which the threat made under excitement, is to have, is a question for the jury.

The ninth request sought to make this a question for the Court.

Therefore, the Court could not be wrong in refusing that request.

[5.] If the expression in the tenth request, had been, *equally* "susceptible," the request would have been a request proper to be granted. The absence of the word, *equally*, rendered the request one not proper to be granted. This must be manifest. If there is a reasonable *doubt*, the hypothesis of innocence, ought to have the benefit of the doubt.

As to the *charges*. The first of these was this: "That if prisoner went out of his house with a riotous intent of killing Spence, or any one else, and was foiled in this, and any one else was killed by him, though he did not intend it, that he was guilty."

[6.] Suppose, after being foiled in the riotous intent, he *abandoned* that intent, and thenceforth, was free from all evil intent, and yet, by accident killed the man, was he guilty? In such case, it could not be that at the time of the killing, he was engaged in the commission of an *unlawful* act. A man *committing* an act, must be acting *voluntarily*, and a man voluntarily doing an unlawful act, cannot be said to be free from all evil intent. If then, McPherson, when his gun went off and killed Carter, had abandoned, or was free from all evil intent, it could not be, that at that time, he was engaged in the commission of any *unlawful* act. (But unless, at the time of the killing, he was engaged in the commission of some unlawful act, he could not be guilty of murder, or of one species of manslaughter, the one of which the jury found him guilty—involuntary manslaughter in the commission of an unlawful act.

The latter part of the charge, then, should have been qualified: "Whilst *in the prosecution* of that intent," should have been inserted—"And any one else was killed by him,"—*whilst in the prosecution of that intent*—"though he did not

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intend it, that he was guilty." This is what the latter part of the charge should have been.

But does the evidence warrant this charge at all? Can it be fairly argued from the evidence, that McPherson went out of his house with a *riotous* intent? To make a riot, there must be the *joint* action of two, or more, persons. The co-operation of two, or more persons. If two, or more, men beat a third, the offence *may* amount to a riot. But if ~~two~~ men fall to fighting *each other*, the offence *cannot* amount to a riot. 1. *Hawk. C.* 65, S. 1. *Conn. Dig.* "Forcible Entry," (D. 8.)

Now are we authorized by the evidence to say, that McPherson, when he went out of the house, did so with the intention or expectation of co-operating with any body in any act of any sort? Was it not peculiarly action "on his own hook," that he sallied forth in pursuit of?

The next charge is: "That if Spence and Leggett went into the smoke house, with notice to Mrs. McPherson the prisoner's wife, prisoner had no right to use a deadly weapon on them; it being at most a trespass?"

[7.] Notice to McPherson's wife, was not a fact upon which McPherson could act, unless he knew of the notice. A man cannot in general, be held accountable as a *criminal* for failing to govern himself by something of the existence of which he is ignorant. There does not seem to be any thing in the evidence to take the case of McPherson out of the general rule.

Again, suppose the truth to be, that though Spence and Leggett notified Mrs. McPherson of their purpose, yet that she *failed to consent* that they might accomplish that purpose. In that case, there can be no doubt, that the notice would be, what would not only be of no avail to the State, but would be, what might be of much avail to the accused. If Spence and Leggett went into the smoke-house without her consent, it might be, that they were burglars or house thieves. And it is justifiable homicide to kill, in defending habitation, pro-

perty, or person, "against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either." 12. *Sec. 4. Div. Code.*

We think, therefore, that the Court should rather have told the jury, that the notice to McPherson's wife, was not a fact that could operate against McPherson, unless he knew of the notice.

The next charge was as follows: "That if Leggett took hold of the gun to protect himself, he had a right to do so, and if the consequences were fatal to Carter, prisoner was guilty."

[8.] Suppose that Leggett was a *burglar*, and being such, took hold of the gun to prevent himself from being shot, and that in the struggle for the gun, it went off and killed Carter; would McPherson in that case, be guilty of murder, or manslaughter in the commission of an *unlawful* act? Is it not *lawful* for the owner to kill a burglar? Most certainly it is. See 12. *Sec. 4. Div. Code. supra.* Does the owner lose this right by the burglar's seizing the owner's weapons to prevent him from exercising the right? Not, it would seem, unless the burglar surrenders himself. There may be doubt on this point. But this is the best conclusion we can come to, at present, on the point. It was not discussed.

It is true, perhaps, that the evidence hardly justifies the supposition, that Leggett was a burglar; but then it is not perhaps equally true, that the evidence does not authorize the supposition, that McPherson might have believed Leggett to be a burglar. And if McPherson did believe Leggett to be a burglar and the circumstances were such, that they would have justified a reasonable man in entertaining such a belief, then the case, doubtless, was not materially different from what it would have been, of Leggett had really been a burglar.

We think then, that this charge should have been somewhat qualified; so qualified as to become this: that if Leggett was

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not a burglar or house thief, nor believed, on sufficient grounds to be one, by McPherson, then if he Leggett seized the gun merely to protect himself, he did but what he had the right to do; and if the consequences were fatal to Carter, McPherson was guilty.

This charge was amiss too, by being *deficient*. A part of the evidence went to show, that Leggett's object in seizing the gun was not defence but offence, was, to get possession of the gun, and break McPherson's head with it. And the charge to have been full, ought to have stated the law applicable to this part of the evidence. Doubtless, the Court will supply the deficiency on the new trial.

The next charge was as follows: "And that if the prisoner did not intend to kill Carter, but went into the yard with evil design towards Spence, and intended to kill him, still he was guilty."

This charge labors under much the same objection, as that which the first charge was found to labor under.

Suppose the fact to have been, that McPherson had *abandoned* his intention to kill Spence, (if such an intention had ever been his,) before the killing of Carter happened: In that case, it is manifest that the previous existence of such intention, could not be a fact to affect at all the question of his guilt or innocence.

In such case McPherson in struggling to retain his gun, would be in the commission of a *lawful act*, and whether the accidental homicide would be *justifiable* homicide, or involuntary manslaughter, in the commission of a *lawful act*, would depend on, whether in the struggle for the gun, he used due caution and circumspection. The homicide could not be of any higher grade.

This charge, then, ought to have been qualified in the manner indicated with respect to the first charge.

The next charge was right. Nothing was said against it in this Court.

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As to the motion for a new trial:

In disposing of the exceptions already disposed of, we have disposed of all the grounds of this motion, except the seventh.

That ground, we do not think true in point of fact.

A new trial must be had; the grounds have been pointed out in the course of this opinion.

Judgment reversed

No. 11.—HERNICK MEER, (next friend,) plaintiff in error, vs. FRANCIS T. HOLTON, defendant in error.

[1.] An instrument was in substance as follows: This Indenture, made, &c. between John Taylor, Sr., and Sythis Meek, his daughter, witnesseth, that the said John, for the love which he has for his said daughter, hath given, granted, and conveyed, and does by these presents, give, grant, and convey to the said daughter, and her children, free from all disposition of her present or any future husband, the following property, to-wit: Toby, Piety, and Mariah; negroes, a fourth part of his stock of cattle, one colt, one mare, one filly, one sucking colt; the mare and colt only during his life, after which they are to be divided among all of his children; (also two beds, bedsteads and furniture, during his life, after which they are to be divided among all his children: he was to have the use, and control of Piety and Mariah during his life, and at his death, they were to belong to his daughter as aforesaid; to have and to hold said bargained property and its increase to her, and all the children, together with all the right and title thereof, to her, and their own use, benefit, and behoof, forever. In testimony whereof, he thereunto set his hand, and affixed his seal.

his
JOHN M TAYLOR.
mark.

Signed, sealed, and delivered in the presence of

JNO. TAYLOR,
JAS. TAYLOR,
NATHANIEL T. HOLTON, J P.

Held, That the instrument was a deed, and not a will.

(2.) The sayings of a person, that are against his interest, are good as evidence against him, and those claiming under him by a title created subsequently to the sayings.

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Trover, in Ware Superior Court. Tried before Judge COOKMAN, at December, Term, 1856.

This was an action of Trover by Hemrick Meek, (as the next friend of his wife, Sythia Meek and her children) against Francis T. Holton, for the recovery of a negro woman named Piety, and her two children.

The defendant pleaded :

1st. The general issue.

2d. The statute of limitations. And

3d. That he held said negroes as the executor of the last will and testament of John Taylor, deceased, to whom they belonged at the time of his death.

Upon the trial, on the appeal, plaintiff proved that the woman Piety, formerly belonged to John Taylor, now deceased. That in the Spring of 1850, John Taylor made a division of his property amongst his children, and executed to them respectively conveyances of the property thus given—and that amongst the property given to his daughter Sythia Meek, was the negro Piety. That he told his daughter to take the negroes home, pay their taxes and take care of them. That he reserved to himself the right to call on Mrs. Meek for the use of Piety whenever he wanted her to work for him, or to hire her out to raise a little money. That said negro was on the same day carried to plaintiff's and there remained for several months and that John Taylor, who was an old man, about eighty years old, about the same time went to live with his daughter Mrs. Meek, where he resided until the fall, when he returned to his old place, and took Piety back with him. He remained at the old homestead until 1854, in possession of Piety, when he was carried or removed by defendant who was his son-in-law, to his residence in Ware county, and shortly afterwards, the woman Piety and children were removed and remained there until John Taylor's death, which occurred sometime in the year 1854, at the house of defendant in Ware county.

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All the testimony of the witnesses, as to sayings and admissions of old John Taylor relating to the gift of the negro to his daughter, made at any other time than while said negro was in her possession, were rejected and excluded by the Court: and to which ruling plaintiff's counsel excepted.

The following instrument of writing was then offered by plaintiff, to the introduction of which, defendant objected, on the ground, that the writing was a will and not a deed. The Court sustained the objection, and ruled out the paper; and plaintiff excepted.

The following is the paper excluded:

STATE OF GEORGIA, } This Indenture, made this the 10th
 Appling County. } day of April, in the year of our Lord,
 eighteen hundred and fifty, between John Taylor, Sr., of said
 county and State of the one part, and Sythia Meek, daughter
 of the said John, and wife of Hemrick Meek, of the same
 place, of the other part: *Witnesseth*, That the said John
 Taylor, for and in consideration of the natural love and affec-
 tion which he has and bears to his said daughter Sythia
 Meek, hath given and granted and conveyed, and does by
 these presents, give grant and convey unto the said Sythia
 Meek and all of her children, free from all disposition of her
 present or future husband, the following property, to-wit: My
 negro man Toby about twenty-two years of age, and my ne-
 gro woman Piety about eighteen years of age, and my negro
 woman Mariah about fourteen years of age, and one-fourth
 part of my stock of cattle, besides them I have given to my
 son James, marked with a crop and split in one ear, hole and
 underbit in the other, branded thus, J. T.; and one sorrel
 colt one year old, and my sorrel mare Pol about eight years
 old, and one sucking colt; the last named mare and colt I
 only give during my life-time, and at my death to be sold
 and divided between all of my children: And I also give to
 my daughter Sythia two beds and bed-steads and furniture,
 during my life-time, and at my death to be divided between

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all my children. The two negro girls Piety and Mariah, which I have given to Sythia Meek, I am to have the use and control of during my life-time, and at my death to belong to said Sythia Meek as aforesaid: To have and to hold said bargained property, and its increase, unto her the said Sythia Meek, and all her children, together with all and singular the right and title thereof, to her and their own proper use, benefit and behoof forever, in fee simple. In testimony whereof, the said John Taylor, Sr. hath hereunto set his hand and affixed his seal, the day and year first above written.

his

JOHN X TAYLOR, Sen'r.

mark.

Signed, sealed and delivered in the presence of

JOHN TAYLOR,

JAMES TAYLOR,

NATHANIEL J. HOLTON, *J. P.*

GEORGIA, }
 Appling County. } *Clerk's Office.*

Recorded the above and foregoing deed in book C, on pages 206 and 7, this 4th day of May, 1850.

JESSE MOBLEY, *Clerk, S. C.*

In the progress of the trial, defendant by leave of the Court, withdrew his plea, that he held the negroes as executor of John Taylor, deceased.

Defendant offered no evidence.

The Court charged the jury. And to many of the charges given, and the refusals to charge as requested, plaintiff's counsel excepted; but as the decision of this Court is confined to the exceptions taken to the rulings and decisions of the Court below upon the testimony, it is deemed unnecessary to set out the charge and exceptions thereto.

The jury found for the defendant. And plaintiff's counsel excepted.

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W. B. GAULDEN, for plaintiff in error.

COLE, HANSELL, LONG, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the instrument offered in evidence as the deed of John Taylor, a deed, or a will? The Court below held, that it was a will, so far as it related to the negroes sued for.

We think that it was not a will, but a deed, even as to those negroes. There were three negroes, Toby, Piety, and Mariah, besides other property mentioned in the instrument. The negroes sued for, are Piety and her children. Now as it concerned all this property, except Piety and Mariah, there is no question but that the instrument was a deed: We think that it was a deed also, as to Piety and Mariah.

Is it possible to suppose, that the author of this instrument intended it to be amphibious; to be both a will and a deed; a will as to Piety, and Mariah; a deed as to Toby and the other property? It may be possible, but, certainly, it is hardly probable.

The instrument is in form, a deed. It is an instrument that can operate as a deed; and can do so, not less as to Piety and Mariah, than, as to Toby and the other property. There is no need, therefore, of holding it to be a will, *ut res magis valeat quam pereat*. Why then, should we by violence done to any thing about it, to even its form, convert it into a will:

The instrument contains these words: "Witnesseth, that the said John Taylor, for and in consideration of the natural love and affection which he has and bears to his said daughter, Sythia Meek, hath given, and granted, and conveyed, and does, by these presents, give, grant, and convey unto the said Sythia Meek, and all of her children," "the following property, to-wit: My negro man, Toby, about twenty-two years of age, and my negro woman Piety, about eighteen years of

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age, and my negro woman Mariah, about fourteen years of age, and one-fourth part of my stock of cattle," &c.

Now, the effect of these words taken by themselves, must have been, to convey the title *immediately* out of John Taylor into Sythia Meek, and her children, so far as "Toby" and the "stock of cattle" were concerned. But if such was the effect as to Toby, and the stock of cattle, such must have been the effect as to "Piety" and "Mariah." The words are applicable to both of the parcels of property.

These words then, took the title, (that is, the whole interest) out of John Taylor, so far as Piety and Mariah were concerned, and put that title in Sythia Meek and her children.

The instrument also contains these subsequent words: "The two negro girls, Piety and Mariah, which I have given to Sythia Meek, I am to have the use and control of during my life-time, and at my death to belong to said Sythia Meek, as aforesaid."

Now, by these words, the maker of the instrument takes back some of the interest of Piety and Mariah, which he had given by the first words; but does he take it *all* back? Certainly not. He takes back the use and control of Piety and Mariah, during *his life*; but the remainder, he leaves where the first words had carried it, viz: the whole interest, in Sythia Meek and her children.

Considering then the instrument as consisting of these two sets of words, its *net* effect in its operation upon Piety and Mariah, was to cause the remainder in the two, to pass out of Taylor into his daughter and her children; to do so *immediately* on the execution of the instrument, and, in her, and her children, ever afterwards to abide.

An instrument that can produce such an effect, cannot be a will, for a will is an instrument that can produce no effect, until after the death of its author.

[1.] We think that this instrument was not a will:

In this opinion, we are supported by *Robinson vs. Schley*

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& *Cooper* 6. *Ga. Rep.* 516. *Jackson and others vs. Culpepper*, 3. *Ga. R.* 469, and perhaps, opposed by *Symmes vs. Arnold and wife*, 10. *Ga. R.* 506; and *Crary vs. Rawlins*, 8. *Ga. R.* 450. There are, however, some facts in the present case, which make it different from the two last cases. In the present the donor after saying, that he gives the whole of the property, says that he is to have an interest for his life in a *part* of the property. It is *certain*, therefore, that the instrument of conveyance is a deed as to a *part* of the property—that part in which there is no reservation of any interest. And it may be argued with more or less effect, that if words of conveyance, are words of a deed in reference to a part of the property which they convey, they are to be considered as words of a deed, in reference to the other part of the property which they convey.

In those two cases, respectively, the donor after saying that he gives the whole of the property, says that he reserves to himself an interest for his life, in *the whole* of the property. It is no more certain, therefore, that the instrument of conveyance is a deed, as to one part of the property, than that it is as to another.

I must say, however, that I regard these two last mentioned cases, as being in conflict with the two first mentioned; and that I go with the two first mentioned. See *Watson vs. Watson*, and *Bunn vs. Bunn*, decided at this term.

Considered as a deed, this instrument was admissible in evidence for the plaintiff.

Suppose then, the instrument to have been admitted in evidence, as it should have been, the first question will then be, whether the sayings of John Taylor, the author of the instrument were also admissible in evidence.

Some of those sayings were uttered at the time when he made the instrument, and some afterwards: Of the latter, a part were uttered when he was in the possession of the property sued for; a part, when the plaintiffs were in the possession of that property. All of the sayings were to the same

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effect, and that was, that he gave or had given, Piety to his daughter Sythia Meek, and her children, but that he reserved the use of Piety to himself for his life-time. That is to say, the sayings were such, that it was against the interest of Taylor to make them, and such, that they ran, not against, but with the written instrument. If then, *Taylor* had been the defendant, the sayings would have been admissible.

Taylor, however, was not the defendant: Holton, his son-in-law was the defendant. But Holton held under Taylor. We are authorized, *prima facie*, to say this. The evidence on the point, was, that John Taylor had the negroes in his possession at his old place; that he went to live with Holton, leaving the negroes behind him; that some weeks afterwards, Holton and another person, came for the negroes, and carried them off; and that Taylor died a month or two afterwards. A presumption arises from all this, that Holton merely assumed Taylor's place as to the negroes, on the death of Taylor, that is, that he had no title to them except one derived from Taylor, as an executor of his own wrong. If so, any sayings of Taylor, that were good against him, were good against Holton, for Holton held under Taylor, and by a title that must have been acquired, (if acquired as supposed, on the death of Taylor,) subsequently to the uttering of any sayings.

[2.] We think, therefore, that the sayings of Taylor were admissible.

Were the sayings of Holton, the defendant, also admissible.

We think so. They were clearly against his interest.

If the instrument had been admitted in evidence, these it is likely are the only questions that would have arisen, if these would. Many of the questions, which did arise, could not have arisen. It is useless, therefore, to take time to dispose of those questions.

There ought to be a new trial.

Judgment reversed.

No. 12.—HENSLEY J. THOMASSON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] A motion to quash an indictment, is a demurrer to the indictment, and must be in writing on the arraignment and before plea pleaded.
- [2.] A witness who has testified in a cause and his evidence is impeached by testimony in contradiction of his statement, may be recalled, and leading questions may be asked him affirmatory of what he has already testified.
- [3.] This Court will not pass its judgment on an exception that the presiding Judge in the Court below does not admit to be correctly stated.
- [4.] Bank notes are the subject of larceny from the person.
- [5.] Money in the hands of a guardian and stolen from him, may be laid in the indictment to be property of the guardian. He has a special property in it.
- [6.] The jury are judges of law and fact, in this State, and their verdict will not be disturbed as being contrary to law and evidence, unless it appear so palpably as to raise the presumption that their finding was the effect of a mistake or misapprehension of one or the other.

Indictment for larceny from the person, in Richmond Superior Court. Tried before Judge HOLT, at April Term, 1857

The defendant, Hensley J. Thomasson was indicted for stealing from the person of Joseph W. Varner a large amount of the Bills of the Mechanics Bank of Augusta. The offence was charged to have been committed in a room occupied by Varner at the United States Hotel in the city of Augusta, on the night of the 20th February, 1856.

After a jury were impanelled and sworn, and the first witness on the part of the State called to the stand, the defendant's counsel moved to quash the indictment, because the bills alleged to have been stolen were not therein sufficiently described, and because there was no such bank as the Mechanics Bank of Augusta, the corporate name being "The Mechanics Bank."

In the further progress of the cause, after the testimony on the part of the State had been closed, and the witness Thomas



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Gibbins, had testified on the part of the prisoner, the following questions were put to the witness' Joseph W. Varner, by the State's counsel, the said Joseph W. Varner having been recalled by the Attorney General as a witness on the part of the State, which questions were objected to at the time, as leading by prisoner's counsel, to wit: "Did Thomasson ask you that evening for the loan of money?" "Did you give him any?" "Did he take any money out of your pocket book by your consent?"

After the testimony on both sides had closed, and the argument of counsel concluded, the prisoner's counsel requested the Court in writing to charge the jury as follows: "That there must be proof of the genuineness of the bank bills, or the defendant must be acquitted," which charge the Court failed and refused to give in the language requested. Prisoner's counsel further requested the Court in writing to charge the jury as follows: "That the defendant must be acquitted of the offence charged in the indictment (larceny from the person,) if the jury find that nothing but bank bills were stolen, that being simple larceny, a different offence—the first punishable by imprisonment in the penitentiary from two to five years, the second from one to four years," which charge the Court declined and refused to give.

The Court modified the first aforesaid request to charge, and used language in said modification in substance as follows; "That defendant's counsel had raised no question as to the genuineness of these bills: that the fact was proven that these were the bills of the Mechanics Bank, and that they were of the value which their denominations called for, and that, if the defendant's counsel had made any proof that these bills were not genuine, it would then have become necessary that the State's counsel should have met it with counter proof." To all which refusals to charge, modification of charge as requested, and charge as given, the prisoner then excepted and now excepts.

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The Court did charge the jury as requested by prisoner's counsel, in substance as follows, that "unless they found Joseph W. Varner was the owner of the bank bills, alleged to have been stolen, they must acquit, and such must be their verdict, if they found that the bills were owned by Varner jointly with another: and that, in cases of circumstantial evidence, the hypothesis of the defendant's guilt must be the only rational mode of accounting for all the facts, and that every other hypothesis must be excluded from their minds before they could convict the accused. /

The jury returned a verdict of guilty, whereupon the prisoner moved the Court for a new trial upon the following grounds:

1st. Because the Court overruled the motion of defendant's counsel, to quash the bill of indictment, because the bills, alleged to have been stolen, were not therein sufficiently described, and because there was no such bank as "The Mechanics Bank of Augusta," the coporate name being "The Mechanics Bank."

2d. Because the Court permitted the following questions to be put to the witness, Joseph W. Varner, by the State's counsel upon direct examination, defendant's counsel at the time objecting to each and all of them as leading, to wit: "Did Thomasson ask you that evening for the loan of money?" "Did you give him any?" "Did he take any money out of your pocket book by your consent?"

3rd. Because, when defendant's counsel requested the Court, in writing, to charge as follows: "That there must be proof of the genuineness of the bank bills or the defendant must be acquitted." * * * * *

4th. Because the Court modified said request to charge, in substance as follows; "that defendant's counsel had raised no question as to the genuineness of these bills; that the fact was proven that these were the bills of the Mechanics Bank, and that they were of the value, which their denominations

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called for: and that if defendant's counsel had made any proof that these bills were not genuine, it would then have been necessary that the State's counsel should have met it with counter proof."

5th. Because the Court stated in his charge to the jury, that the fact was proven, that these were the bills of the Mechanics Bank and that they were of value.

6th. Because the Court declined to charge the jury, as requested in writing by defendant's counsel, as follows: "That the defendant must be acquitted of the offence charged in the indictment, (larceny from the person,) if the jury find that nothing but bank bills were stolen, that being simple larceny, a different offence, the first, punishable by imprisonment in the Penitentiary, from two to five years; the second, from one to four years.

7th. Because the jury found a verdict of conviction contrary to the law and the charge of the Court, in this, that the Court charged the jury that, unless they found Joseph W. Varner was the owner of the bank bills alleged to have been stolen, they must acquit, and such must be their verdict, if they found that the bills were owned by Varner jointly with another, the evidence showing that the ownership was jointly in Joseph W. Varner and Felix Varner.

8th. Because the jury failed to make a proper application of that principle of law, given them in charge by the Court, that, in cases of circumstantial evidence, the hypothesis of the defendant's guilt must be the only rational mode of accounting for all the facts, and that every other hypothesis must be excluded from their minds before they could convict the accused.

9th. Because the jury disregarded the law, which was given them in charge by the Court, that, in all criminal cases, the verdict must be the result of moral certainty, and not a balance of probabilities.

10th. Because the verdict was contrary to law, evidence and the preponderance of evidence.

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After hearing argument, the Court refused a new trial.

Whereupon the prisoner excepted, and now excepts to the said ruling and decision, and alleges error, upon all the grounds taken in the motion. Thereupon, the Court passed judgment upon the prisoner, sentencing him to hard labor in the Penitentiary for the term of five years.

To which judgment and sentence the prisoner excepts and alleges error therein.

MILLERS & JACKSON; and WALKER & CUMMING for plain tiff in error.

McLAWS, Attorney General, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

There was a new trial moved for, in this case, on ten grounds. In the motion all the exceptions to the rulings and decisions of the Court during the progress of the trial, are embraced. The Court overruled the motion and this decision is excepted to, and our judgment on that exception will dispose of the several errors assigned.

[1.] After a jury was empannelled and sworn, and the first witness called to the stand, the defendant's counsel moved to quash the indictment, because the bills alleged to have been stolen were not therein sufficiently described, and because there was no such bank as the Mechanics Bank of Augusta, the corporate name being the "Mechanics Bank." The record does not show a demurrer, but the general issue only, as the pleadings of the defendant. In England, the defendant seldom demurs to a bill of indictment, because he may have the same advantage upon the plea of not guilty or upon motion in arrest of judgment, as well as for other reasons. *Arch. Crim. P.* 60. He may move to quash the indictment in the English Courts, if the Court have no jurisdiction, or if the facts charged do not constitute an offence punishable at law.

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These are grounds of demurrer. Motions to quash are merely demurrers to the bill of indictment, and allowed in England for the reason, that they do not there generally demur to bills of indictments. In this State, if the prisoner on being arraigned, demur to the indictment, the demurrer must be made in writing. *Paragraph 304 Penal Code. Cobb 834.* If the demurrer be decided against him, he may plead and rely on the general issue. The cause had been submitted to the jury before the motion was made, and before plea pleaded, and it came too late. The object of the Legislature was intended to prevent the acquittal of parties indicted on mere technical grounds. In England, the Courts will seldom quash an indictment when the motion is made by the defendant. *Arch. Cr. Pl. 40.*

[2.] Joseph W. Varner had testified to certain facts. A witness was introduced, the object of whose testimony it was, amongst other things, to attack his credit, who testified that the plaintiff, Thomasson, had applied to a man in bed to loan him some money. He understood the man to say, "take it," or something like it. He did not know whether it was Varner or not, it was the man in the bed. It had been proven that Varner slept in that room. Varner was called and asked the following questions:

1. Did Thomasson that evening ask you for the loan of money?
2. Did you give him any?
3. Did he take money out of your pocket book by your consent?

An examination of this sort is sometimes admissible. 1. *Greenleaf* §435. Very great discretion must necessarily be left to the presiding Judge, in the examination of witnesses, and unless he use this discretion in violation of a principle of law, we cannot control him. 4. *Wend*, 247. The questions in this case were intended to contradict a witness introduced for the purpose mentioned, and not to inculcate the prisoner. It was to re-affirm what the witness had already

sworn, and in respect to which the witness Gibbons had given evidence in opposition to his statement. He had already testified that he had never loaned the prisoner money at any time. The presiding Judge committed no error in this.

[3.] It is insisted that the Court erred in charging the jury, as set forth in the 3d, 4th, and 5th grounds of the motion for a new trial. This charge does not come to us in a manner to enable us to decide upon it. The presiding Judge does not admit the existence of the grounds as taken, and says there is a difference of recollection as to the words used in the charge. We will remark, however, that, there was proof that the bank notes offered in evidence, were the bank notes of the Mechanics Bank, and of the value of their several denominations, and upon this they were tendered and received in evidence without further objection, which amounted to a waiver of further evidence of their genuineness.

[4.] The counsel for defendant requested the Court to charge the jury, that if nothing but bank bills were stolen, the defendant must be acquitted of the offence of larceny from the person, the offence being simple larceny. At common law, bank notes being mere evidences of debt, were held to be not such goods and chattels of which larceny might be committed. *Cobb* 793. Our statute however, declares, that the taking and carrying away a bank bill belonging to another, with intent to steal the same, shall be simple larceny. Bank notes, then, are, by statute, made such goods and chattels whereof larceny may be committed. Larceny from the person is a higher grade of offence than simple larceny, because more daring, and it might possibly lead to the commission of other crimes. If an hundred dollars be stolen from any place, other than from the person or a house, the offender may be punished as low as one year in the Penitentiary; while if the same sum be stolen from the person or a house, he cannot be punished by less than two years imprisonment in the Penitentiary. We hold, therefore, that bank notes may be the subject of larceny from the person;

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that the charge as requested, ought not to have been given by the Court to the jury.

[5.] The finding of the jury we think was warranted by the evidence under the charge of the Court as stated in the seventh ground for a new trial. The money arose from the sale of cotton belonging to himself and brother; he advanced money to his brother, and he claimed the money as his own. His brother was a minor and he was his guardian. The property in bank notes was properly laid in the prosecutor. The title was in him if he was guardian.

[6.] The jury, in this State, are judges of both the law and the facts in criminal cases, and unless their finding be clearly contrary to law and evidence, which must be presumed to arise from mistake or a misapprehension of one or the other, the Court ought not to disturb it. We think, without recapitulating the evidence, however, that if the jury had found a different verdict, it would have been by a misapplication of the rules of law in regard to the evidence and its effect, given them in charge by the Court as set forth in the eighth and ninth grounds for a new trial.

We think that the law, the evidence and the preponderance of evidence sustain the verdict.

Judgment affirmed.

No. 13.—URBANUS DART, *et al.* plaintiffs in error, vs. JAMES HOUSTON, *et al.* defendants in error.

[1.] The State is not inhibited by any provision in the Federal Constitution, from passing an act controlling the management of an incorporated Academy, which is endowed entirely by the State. It may change the mode of electing Trustees and supersede those in office.

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- [2.] If Trustees of an incorporated Academy are elected under the authority of an act which does not declare the number to be elected, and the Legislature subsequently recognizes the trustees thus elected as the legal board, it is a ratification of the election.
- [3.] If a corporate body consist of ten, and a suit is brought by five of the members of the corporation, setting out their names, it is not the suit of the corporation, the charter not authorizing a less number than a majority to sue.
- [4.] A *quo warranto*, does not afford an adequate remedy to *cestui que truste*, who charge trustees of an incorporated Academy with breaches of trust; nor is it adequate for their successors who make the same charges, though the former claim the office on the ground that they have not been legally superseded.

In Equity from Glynn Superior Court. Decision on demurrer, by Judge COCHRAN, at April Term, 1857.

The following is the bill and exhibits filed by complainants in this cause, and to which defendants demurred.

GEORGIA, GLYNN COUNTY.

To the Honorable the Judge of the Superior Court of the Brunswick Circuit of the State of Georgia, having jurisdiction in Equity.

Humbly complaining, showeth unto your Honor, your Orators, James Houston, J. M. Tison, S. M. Burnett, S. M. Timmons and J. W. Moore, Trustees of Glynn County Academy, in the county of Glynn, and said State, chosen by the Grand Jury of said county, according to the provisions of the act of the Legislature of said State, dated February 18, A. D. 1854, who institute this bill of complaint in their said capacity as Trustees, as well as in behalf of the citizens of Glynn county;—that on the 18th day of February, A. D. 1854, the Legislature of said State passed an act, the title of which is in the words following, to wit: “An act to alter and change the mode of appointing Trustees of Glynn County Academy, in the county of Glynn, and to compel their Treasurer to give bond and security for the faithful performance of his duty, and for other purposes therein named”—and that the

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first, seventh and eighth sections of which are in the words following, to wit:

“SEC. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same, That from and after the passage of this act, the Trustees of the Glynn County Academy, in the county of Glynn, shall be appointed by the grand jury of said county, at the first term of the Superior Court after the passage of this act, or at any term hereafter, by ballot or otherwise, as they may deem proper.”

“SEC. 7. And be it further enacted, &c., That the present Trustees be, and they are hereby required, to turn over to the Trustees appointed under this act, all the books, buildings, papers, lands and money belonging to said academy fund.”

“SEC. 8. And be it further enacted, That all laws and parts of laws militating against this act be, and the same are hereby repealed.”

And your orators further inform your Honor, that at the date of the passage of this act aforesaid, and for a long period afterwards, as your orators are informed and believe, Urbanus Dart, E. C. P. Dart, Alexander Scranton, Thomas Bourke, Henry Dubignon, Wm. A. Couper, H. F. Grant, D. H. B. Troup, Wm. Gignilliat and F. M. Scarlett, all of said county and State, were the acting members of the said old Board of Trustees of said academy, and that several of them were acting members of the grand jury the year then next ensuing, and that they used their influence over that body during said time, as your orators are informed and believe, to denounce and to resist the said law of the State and to prevent the grand jury of said county at either of the terms of said court for the year A. D. 1854, from electing said Trustees of said academy, and that principally in consequence thereof, no Trustees of said academy were chosen by said grand jury during said year of A. D. 1854, and the

operation of law of the State enacted for the benefit of the people of Glynn county was thereby defeated for that year. And your orators further inform your Honor, that at the April term A. D. 1855, of said Superior Court, for said county, the grand jury of said county, in accordance with the provisions of said act, did duly elect F. M. Scarlett, H. F. Grant, W. A. Couper, Thomas Bourke, H. Dubignon, S. M. Timmons S. M. Burnett, J. W. Moore, J. M. Tison and James Houston, Trustees of Glynn County Academy—that the five first named persons were five of the same persons above named, as having been the acting members of the old Board aforesaid—that said H. F. Grant and W. A. Couper thereupon instantly declined to accept said office, and being members of said grand jury, and combining with said U. Dart and three other members of said body, they assumed to pronounce, and in their capacity as grand jurors did pronounce said law of the State to be unconstitutional and void, and entered their protest upon the records of said grand jury to that effect—that said Thomas Bourke and H. Dubignon declined to accept said office, or to discharge any of its duties—and that the said F. M. Scarlett having so far accepted said office as to attend the first meeting of the said newly elected Board of Trustees of said academy immediately thereafter resigned his said office. And your orators ask leave to annex a copy of the record of their said election by said grand jury, and of said protest, which is marked A.

And your orators further inform your Honor, that immediately after their said election, they duly met and duly organized their said Board by the choice of S. M. Burnett as Chairman, J. W. Moore as Secretary, and James Houston as Treasurer; and that thereupon they immediately took upon themselves the duties and responsibilities belonging to said Board, and proceeded to assume the discharge of the same; and that in pursuance thereof, they engaged a teacher for said academy; and on the 21st day of May A. D. 1855, as said Trustees, they took possession and control of the said acade-

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my building, situate in the village of Brunswick, in said county, and placed said teacher in the same, and opened a school therein under his and their immediate direction, for all the children of said county of Glynn, and have maintained said teacher and his successor and said school therein, from that date to the time of the filing of this bill of complaint, and have paid the expenses of the same.

And your orators further inform your Honor, that the said act of February 18th, 1854, does not prescribe the number of which said newly elected Board shall consist; but the grand jury having appointed ten persons, acting under the impression, as your orators believe, that the old Board aforesaid consisted of ten members legally appointed thereto; your orators being desirous that their number should be increased to ten, if it would be legal so to do, and that the vacancies of those who had resigned, should be filled by men who would recognize their obligation as public officers, charged with the possession of a portion of the funds of the State, and to obey the laws of the State in reference thereto; they reported the number of their Board to the said grand jury of said court, at the last April term thereof, with other pertinent facts connected therewith, according to the provisions of said act—but said U. Dart and Alexander Scranton, being members of said grand jury, combined, together with others, to produce violence in said grand jury room—and to intimidate other members of said grand jury, and to resist said act of the Legislature, and the instructions of the presiding Judge, which they had sent for and obtained, in reference thereto, and finally to abandon said grand jury room, and to break up the session of said body before any definite action could be had upon that subject, as your orators are informed and believe.

And your orators further inform your Honor, that in the year A. D. 1796, the State of Georgia commenced to create a fund from the sales of the State lands, and from other resources of the State, to be used under the direction of such agents as the State might, from time to time, appoint, or

cause to be appointed for that purpose, in supporting an academy or Seminary of learning, for the common use and benefit of all the people of the said county of Glynn; and that for the purpose of carrying into effect this design, and to bring home to all of the children of the county of Glynn, the means of education at the expense of the State, by an act of the Legislature of the State dated February 21st, A. D. 1796. George Purvis, Richard Pritchard, Moses Burnett, John Piles and John Burnett were appointed commissioners to lay out the town of Brunswick into lots, and to sell certain lots therein belonging to the State—and among other things the third section of the act required in the language following: that “the monies arising from such sale shall be applied to the support of an academy or seminary of learning, in the county of Glynn.” And by the act of February 13th, 1797, the commissioners aforesaid of Brunswick were authorized to sell five hundred acres of land belonging to the said State, and called the commons of Brunswick—“which monies arising from the sale of said land shall be applied, under the direction of said commissioners of Brunswick, as follows, to wit: one moiety thereof to the use of the court house and jail, and the other to the use of the academy.”

And your orators are informed and believe, that from these and other sources, the State of Georgia furnished the funds necessary to establish, and did establish and maintain an academy for the use and benefit of the people of said county, called the Glynn County Academy, and which was superintended by officers of the State, called commissioners of the town of Brunswick, and appointed by the State for that purpose.

And your orators further inform your Honor, that on the 13th of December A. D. 1813, by an act of the Legislature, William Page, Henry Dubignon, Gee Dupree, Leighton Wilson, and William Houston were appointed commissioners of the town and commons of Brunswick and of Glynn County Academy; “and were fully authorized to sue and be sued,

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and to do all things that may be necessary to recover such monies as may be due for rent or otherwise to the former commissioners of the aforesaid town and commons"—and thereafter by the terms of said act, only one quarter part of the rents of said commons were to be appropriated to the court house and jail of said county—and the number of commissioners as Trustees for said academy still continued to be five, and thereafter three-fourths of the State fund was to be used in maintaining said academy instead of one-half as formerly.

And your orators further inform your Honor, that on the 18th day of December A. D. 1814, the Legislature of Georgia, by an act of that date, added John Burnett and James May to said Board of Commissioners of said academy, making the number seven instead of five, and continued to said board the same coporate powers "to sue and be sued," &c., and authorized them to choose one of their own Board Treasurer, and required him to give satisfactory security, and continued the use of the same proportion of the State fund, to each of the aforesaid county purposes, to wit: three-fourths to the support of the academy, and one-fourth to the court house and jail.

And your orators further inform your Honor, that by an act of the Legislature, dated December 20th, 1817, entitled "An act to alter the manner of appointing the commissioners of Glynn and McIntosh counties," it was enacted as follows, to wit: "That in future the commissioners of the academy of the county of Glynn shall be elected by the persons entitled to vote for members of the General Assembly, and be superintended by one magistrate and two freeholders of the county; and the persons having the highest number of votes shall be duly elected, and they shall hold their appointments for the term of four years, and until their successors are elected." Other sections prescribed the time for said elections, and the term of the office to be four years, and repealed all laws inconsistent therewith, and these commission-

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ers were clothed with the same corporate powers over said State funds, that were exercised by their predecessors in said office. And the change consisted only in the mode of choosing said Trustees, and in the persons, and not in the powers, duties, or rights of the two sets of the incumbents.

And your orators further inform your Honor, that on the 3d day of December A. D. 1821, and before the said four years had expired, Samuel Boyd, Henry Dubignon, James Moore, Isaac Abrahams and John Gignilliat were appointed Trustees of said academy, and they and their successors were declared to be a body corporate, by the name of the Glynn County Academy; and they were clothed with the same powers, as all the former boards and with some additional powers, to make bye-laws, &c., and their numbers were reduced from seven to five, and they were appointed by the Legislature, instead of being chosen by the people, and had authority to fill vacancies in their Board, and like all their predecessors appointed by the Legislature, they held their office for no specified period of time.

And your orators further inform your Honor, that on the 22d day of December A. D. 1823, the Legislature passed an act, the first section of which is in the words following, to wit: "That Robert Hazlehurst and James Hamilton Couper be, and they are hereby appointed, commissioners of the Glynn County Academy, in addition to those already in office, and they are hereby authorized to appropriate all or any part of the money which may be on hand belonging to said academy in the establishing of two free schools, one in the 26th district, at or about Wm. Houston's, and one in the 27th district, at any place the commissioners may think proper, and they are authorized to employ one teacher for each school." By the 3rd section of said act, it was enacted, "That the operations of said Glynn County Academy shall cease,**** until the funds of said Institution shall so increase as to enable the commissioners to carry into effect the above named free schools, and by a subsequent section, the Treasurer of said

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Board of Trustees was required to account to said commissioners for the money on hand.

And your orators further inform your Honor, that on the 21st day of December A. D. 1835, the Legislature passed an act, the Preamble to which is in the words following, to wit: "Whereas there are about nine hundred acres of commons attached to the town of Brunswick, which is more than necessity or convenience requires; and whereas the academic and poor school fund of the county of Glynn is not sufficient for the purposes of education in said county;" therefore the commissioners were authorized and required to lay off into lots, three hundred acres of the commons of Brunswick, and sell the same. "That one-half of the proceeds of the sale of said lots should be applied to the support of *free schools* under the *direction* of the Trustees of Glynn County Academy, and the other half to augment the funds of said academy." And that in pursuance of said authority, said lots were sold immediately thereafter, and said Trustees realized therefrom, as your orators are informed and believe, about fourteen thousand six hundred and fifty dollars, in the summer of 1836.

And your orators further inform your Honor, that from December A. D. 1823, to December 1838, said Board consisted of seven persons as aforesaid, and that on the 31st day of said December A. D. 1838, there was incorporated into a Legislative act, the following words, to wit: "That Urbanus Dart, Francis M. Scarlett, William A. Howard, Frank Gage and J. Bancroft be, and they are hereby added to the Board of Trustees of the academy of the county of Glynn," thereby making the number of acting members twelve instead of the former number.

And your orators submit to your Honor, that as the title of said Act makes no reference to this part of said enactment, whether the said enactment is not wholly void under the provision of the State Constitution, designed to restrain persons from practising frauds upon the Legislature, the State, and the people? And whether said U. Dart, and his said

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associates, have ever been legitimate members of said Board? And your orators further inform your Honor, that all of said Dart's said associates so added to said Board, have resigned, and others have been added in their places by said Board, without even the form of law for the same, as your orators are informed and believe.

And your orators further inform your Honor, that during the half century or more which has elapsed since the State commenced the creation of said fund, to be used and expended for the common benefit of all the children in Glynn county; the State alone has created the entire fund, that no part of the same has been furnished from any other source; that the State only has appointed or caused to be appointed, in the mode prescribed by law, all agents to manage said funds; that all said agents have held their said offices only during the pleasure of the State authorities; that all the powers of said agents over said funds; have been derived only from the State, to be used not for the benefit of themselves, but for the benefit of the people of Glynn county; that the State alone has prescribed the mode in which the official existence of these agents, as such, may have been perpetuated during the pleasure of the Legislature; that the State has removed the said agents at pleasure and appointed others in their stead, and changed from time to time their numbers, their powers and their duties, and designated the different public purposes to which said monies should be applied and specified the different and exact proportions from year to year, in which said appropriations were to be made, that the only party who have been the recipients of the States bounty during said period, has been the people of Glynn county; the State alone has given, the people alone of said county have received: and that all persons, or Boards, denominated Trustees, or Commissioners of the academy, of the court-house and jail, or of the poor children of said county, have been only instruments, or conduits in the hands of the State, through which the bounty of the State has flowed to the

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people of the county of Glynn ; that said Trustees and commissioners have never had any interest in said funds, or in the manner, or purpose of their appropriation, beyond that which has been common to every citizen of Glynn county ; that the only two parties who are interested in said funds, are, on the one hand the giver, the State of Georgia, and on the other hand, the receiver, the people of Glynn county ; that said Trustees have not any equitable lien on said funds for any purpose, nor upon their said offices, as said Trustees ; and that they, and their predecessors, came into office, as they were removed from them, by the will of the Legislature of the State : all of which acts, your orators submit, carry their own construction with them, and afford a contemporaneous interpretation of the power and purposes of the different legislative bodies of the State, and of the understanding and position of the different boards of said Trustees, too clear and too well defied, to be mistaken by these respondents.

And your orators further inform your Honor, that the State of Georgia committed to the care of said different boards of Trustees and commissioners, about fifteen hundred acres of land, denominated "commons of Brunswick," and all the "unappropriated lots" of land of the town of Brunswick, all said lands being situate in the town of Brunswick, and gave said boards ample powers to protect the same, and made it their especial duty so to do, and to collect the rents and profits of said "Brunswick commons and town lots," for the use of said academy fund ; and in the year 1796, the Legislature passed an act to prohibit persons from running up said lands, and to take from the Executive of the State, the power to issue any grants for the same, and if issued to make such grants null and void, which act is in the words following :

"And whereas, several persons have at sundry times made attempts to run up the commons of said towns of (Brunswick and Frederica,) but have been as often defeated in the caveat courts of said county, by the exertions of some of the proprietors of the said towns of Brunswick and Frederica,

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“Be it enacted, that any person or persons who may attempt to run up any part of said commons or towns of Brunswick or Frederica, under any pretence whatsoever, shall be liable to a fine of five hundred dollars, to be recovered in the Superior Court of said county, by the commissioners, or any other person or proprietor of any lot or lots in the same towns, which said money shall be applied, one half to the use of the academy and the other to the use of the person, or persons suing for the same, and all surveys heretofore made, or grants surreptitiously obtained, are hereby declared null and void, and any person or persons taking possession, by virtue of any survey or grant as aforesaid, shall be liable to the aforesaid fine, to be recovered in manner aforesaid.” And your orators further inform your Honor, that in the year A. D. 1826, said U. Dart, for the purpose of acquiring a large number of said town lots of Brunswick to his own use, and to deprive the said academy fund of the same, and in direct violation of said law of the State, run up all said academy lots in said town of Brunswick, and as your orators are informed and believe, by a fraudulent misrepresentation, or concealment of the facts from the Executive of the State, obtained grants of the same to himself and one William B. Davis; and that they and those claiming under them, have pretended to own the same, and have collected the rents and profits of said lots to their own use; and the said Dart now claims to own the following lots in said town, so run up as aforesaid by him, and to collect the rents and profits of the same to his own use and benefit, and that he has collected the rents and profits of the same to his own use, during the whole time he has been an acting Trustee in said Board, said lots being about one hundred and forty, as designated in said Dart’s said notice, a copy of which your orators annex and mark B.

And your orators further inform your Honor, that since the year A. D. 1838, said U. Dart has been an acting and leading member, as your orators are informed and believe, of

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the said Board of Trustees of said Academy fund, and that it was made his duty, as said Trustee, to have protected said property, and to have collected the rents and profits thereof, for the use of said academy fund, and of the people of Glynn county.

And your orators further inform your Honor, that prior to the year A. D. 1837, the commissioners of said academy fund, had sold seven hundred and eighty-five acres of the "commons of Brunswick;" and that about that time, Thomas Butler King, at that time a member of said Board of Trustees of said academy fund, run up and surveyed about seven hundred and five acres of said commons of Brunswick, being the entire remaining part of said commons except about ten acres, and obtained from the Executive of the State, by a fraudulent misrepresentation, or concealment of the facts, all the said land, as your orators are informed and believe, for his own use and benefit, including in said grant, the academy building then standing thereon, and which had been erected by said Trustees, at an expense to said academy fund, of six thousand dollars; and your orators are informed and believe, that at that time, and for many years before that time, said Trustees had been in possession and occupancy of said lands and buildings, and had been receiving the rents and profits, thereof; and that said academy building had been used and occupied by the children of the people of Glynn county, as such; and that said Trustees in disregard of their duty allowed said King to take the possession of the said lands, and to deprive them of the rents and profits thereof, and to take possession of said academy building and to place his own tenants therein; and that said King immediately thereafter sold said academy building and all said land, to other parties, who now claim the same under his said title, and that said academy building is now occupied by a private citizen as his own property; and that from that time to the time of filing this bill of complaint, the said academy fund has been deprived of the use of the same; and that between the years of A. D.

1838 and 1841, said Board of Trustees erected another academy building out of the same academy fund, at an expense of six to eight thousand dollars, to replace the one they surrendered to said King as aforesaid, in the village of said Brunswick.

And your orators respectfully submit to your Honor, that it was the duty of said board of Trustees and their successors in office to have prevented said lands from being so run up and surveyed by said Dart and said King, and from being so occupied by them; and to have filed their caveats before the proper tribunals of the State, and to have prevented both said Dart and said King, from obtaining their said grants; and to have retained possession of said lands and said academy building against said Dart and King, or any person claiming under either of them, as it was their duty to resist an open and avowed trespasser upon said lands, or a bold depredator upon the monies of said academy fund; that the terms of said statute having deprived the Executive of any power or authority to issue such grants, said grants were absolutely void, and consequently were nullities; and that the Trustees of said boards for the time being and their successors, have been guilty of a gross neglect of duty toward said property and said trust fund, and guilty of wasting and losing the same, and the rents and profits thereof, from that time to the present; and that they are bound, as your orators insist, out of their own individual property to make good to said fund the full amount of principal and interest so lost and wasted by them, and each of them.

And your orators further inform your Honor, that by virtue of the laws of the State, it was the duty of the said several boards of Trustees since the year A. D. 1823, to have appropriated one moiety of said academy fund to the support of two free schools, one of which at or near William Houston's, a populous neighborhood about twelve miles from the village of Brunswick, and the other in some convenient part of district number twenty-seven, in said country, also a pop-

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ulous part of said county; but that said old Boards of Trustees, have systematically disregarded the laws of the State, and the wishes of the people of Glynn county, in this respect, and that they have never established or maintained, for any considerable time any such school near said Houston's, in district number 26, nor any such school in district number 27, except for short periods; and for the last fifteen years, as your orators are informed and believe, no such free school has been kept or maintained in either of said districts, as required by law, and that in consequence thereof, the great body of the children of Glynn county, living out of said village of Brunswick, have been deprived of the benefits of said school fund.

And your orators further inform your Honor, that by the Act of February 14, 1856, the board of Trustees elected under the Act of February 18, 1854, are required to erect suitable buildings for the children of said county, at or near St. Paul's Church, and on the St. Illa neck in said county, and to elect a teacher or teachers, and cause them to be paid out of the interest of said fund, after the interest of the fund created by the Massie donation has become exhausted;" and that one-half of the funds raised and paid over to the Trustees of Glynn County Academy, under the aforesaid Act of December 21, 1835, was thereby set apart for the education of the poor children of the county, the interest of which is to be applied by said Trustees, elected under said Act of 1854, as aforesaid."

And your orators further inform your Honor, that one moiety of the sum received from the sale of said 300 acres of said town commons to said academy fund, with the interest and the dividends upon the stocks in which the same have been invested, will amount as your orators are informed and believe, to thirty thousand dollars or more, exclusive of any amount that may have been paid out according to law, for the support of said two free schools in said districts number 26 and 27. And your orators submit that the said

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Board of Trustees and the members thereof are liable, and should be compelled to pay the full amount of said free school fund to your orators, to be by your orators expended according to the provisions aforesaid of said act of February 14, 1856.

And your orators are further informed and believe, that of the funds received by said board of Trustees as aforesaid, they now hold and possess about twenty thousand dollars, in cash and stocks, and that the same is deposited in the Planters Bank, Central Rail Road and Banking Company, and the Bank of the State of Georgia, all situate in Savannah in said State, and that in addition, there is due from said U. Dart the balance of an execution of about six hundred dollars, for monies loaned to him from said trust fund in 1847, that said U. Dart and E. C. P. Dart, with some other parties, owe said fund about two thousand dollars, for the balance of a loan made from said fund to the Brunswick Lumber Company in 1840, of which said Messrs. Darts were members, and personally liable for its debts, as your orators are informed and believe; and that there is due from said Thomas Butler King, in principal and interest, eight to ten hundred dollars, for \$373 delivered to him at Milledgeville, in the year A. D. 1839, belonging to said fund, and not paid over by him to said fund.

And your orators are informed and believe, that there has been taken out of said fund, by Alexander Scranton, principally in the year 1853, between fourteen and fifteen hundred dollars; and as your orators believe for about one moiety of that sum, the academy fund has received no adequate consideration; and that amount is due to said fund accordingly from him.

And your orators further inform your Honor, that said Act of February, 18th, 1854, took effect from the day of its passage, and thereby removed the members of the old Board accordingly, from their said offices of said Trustees, on that

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day; and that since their said removal, as aforesaid, they have expended, of said academy fund, about six thousand and two hundred dollars; that four hundred and fifty dollars of this amount has been by them paid, to retain six counsellors of the law, eminent for their learning and ability, to enable said pretended Board the better to resist the laws of the State, and the application of the said funds of the State to the purposes and objects of, and in the manner, designated by the different Legislatures of the State; and, as your orators are informed and believe, other large sums have been paid out of said fund, for the salaries of school teachers, kept for the benefit of the children of said respondents and a few other persons; and your orators respectfully submit to your Honor, that said respondents from their individual property, are bound to restore the said amount to said funds, with the interest thereon, or its equivalent therefor.

And your orators further inform your Honor, that all the records of said several boards of trustees and commissioners, are lodged in the keeping of said E. C. P. Dart, as the acting Secretary of said pretended board; and that your orators have demanded the same and an inspection thereof; but that the same have been refused; and that in consequence thereof, your orators are not now able to inform your Honor more particularly, who constituted said boards at different periods of the same; and cannot, therefore, at this time, make them parties to this bill.

And your orators further inform your Honor, that Henry Dubignon is the acting Treasurer of said pretended board of trustees, and has been Treasurer of all the aforesaid boards, since the year A. D. 1816; that he has exhibited freely the books to your orators, of said old boards of Trustees wherein the Treasurer's accounts have been kept. And that your orators have demanded of him said academy fund, and all the funds, property and stocks of the said fund, or belonging thereto, or making a part of the same, either under the con-

trol of himself, as said Treasurer, or of the said old board. And said Dubignon has informed your orators, that he is desirous of surrendering the same to your orators, and believes it to be his duty, and the duty of the old board to obey the laws of the State, till they are adjudged to be void by the Courts of the State; but that he is restrained from so surrendering said academy funds, by the order and direction of the said old board of Trustees; and that therefore he desires the order and authority of this Court for so doing, and for his protection and security, and to place the said funds under the order and protection of said Court to be by your Honor disposed of according to the final adjudication of said Court.

And your orators are further informed, and believe, that since the said 18th day of February, A. D. 1854, at some time, said William A. Couper, Thomas Bourke, and F. M. Scarlett have resigned their said offices, as said Trustees in said old board, and that their places have been filled by the election by said pretended board, of J. H. Couper, Alexander McDougald and Robert Hazlehurst, Jr., in said county and State; and that said three last named persons have acted as members thereof, and participated in the expenditure and partial waste of the aforesaid six thousand two hundred dollars, since their said election. And your orators are further informed and believe, that said J. H. Couper was one member of said board of Trustees at the time said King took said lands and said academy building from the control of said board of Trustees aforesaid, and remained an acting member of said board many years thereafter, but for the reasons before stated, they are not able to give the dates, nor the names of his said associates.

And your orators had well hoped that the said members of the said old board of Trustees aforesaid, would have complied with your orators' reasonable requests, and with their own duty in the premises, and yielded that obedience and respect which are due to the laws of the State, and to the

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administration of justice in the Courts of the State, and would have abstained from the demoralizing example of resisting the enactments of the same authority that gave them their official existence, and of usurping the power delegated only to the Judiciary of the State, of pronouncing legislative acts to be null and void.

But so it is, may it please your Honor, the said respondents conspiring and confederating with divers persons unknown to your orators, but whom, when discovered, your orators pray may be made parties to this bill, with apt words to charge them, absolutely refuse to comply with your orators' reasonable requests, and to comply with the said laws of the State, and refuse to surrender up the books, property, papers, records, lands, monies and stocks in their possession, and under their control, belonging to said academy fund, and to account to your orators for the monies and property which have been by them expended and wasted, as aforesaid, or any part of the same; or to cease to act, as said board of Trustees, or to cease to claim possession of said academy building, or to control said academy funds, and insist upon going on with their illegal acts, and the waste and expenditure of said academy funds; all of which said acts and doings are contrary to equity and good conscience, and tend to the wrong and injury of your orators and of the citizens of said county of Glynn in the premises. In consideration whereof, and for as much as your orators can only have adequate relief in the premises in a Court of Equity, where matters of this nature are properly cognizable and retrievable—To the end therefore, that the said Urbanus Dart, E. C. P. Dart, Alexander Scranton, Thomas Bourke, Henry Dubignon, Wm. A. Couper, H. F. Grant, D. H. B. Troup, Wm. Gignilliat, F. M. Scarlett, Alexander McDonald, Hazlehurst Jr., J. H. Couper and Thomas Butler King; and also the Planters Bank, the Central Rail Road and Banking Company, and the Bank of the State of Georgia, and their confederates and

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associates, when discovered, may, upon their several and respective corporal oaths, to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make, to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they and every one of them distinctly interrogated thereto; and that an account may be taken of all the said Trust property, and of the funds which have, or but for the default and neglect of the said respondents, might have, been received by them, or by any other person or persons, by their orders or the order of either of them; and also an account of their application thereof, and that the said respondents may respectfully be decreed to pay what shall appear to be due from them upon such account, and that said respondents may be removed in fact, as they have been in law, from being and acting as said Trustees, and that in the meantime, some proper person may be appointed by your Honor to receive and collect the said Trust estate and effects, and that the said respondents may be restrained and enjoined by the order of this Court, from any further interference with the said Academy Trust fund, or the academy building; and that said Banks may be restrained and enjoined from paying out any of said trust funds, or from disposing of or transferring any of the same, except by the order of the court; and that your orators may have such other and further relief as the nature and justice of the case may require. May it please your Honor, to grant unto your orators the writ of injunction to be directed to the said respondents, enjoining them and each of them from interfering in any manner with said trust fund of said Glynn County Academy, or with said academy building, and requiring them and each of them to surrender the records and books of said Board of Trustees into the hands of the said Court, and also enjoining said Banks from paying out any part of said funds, or using the same, or transferring any of the said

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stock belonging to said academy fund, except by the order of this Court, and also the writ of subpoena to be directed to each of said respondents commanding them, upon a day named therein, and under a certain penalty, to appear before this Honorable court, to answer this bill of complaint; and to perform and abide by such order and decree as to your Honor shall seem meet. And your orators will ever pray.

A. G. JEWETT,
WRIGHT & SAVAGE,
Solicitors of Complainants.

“You, James Houston, a Trustee of Glynn County Academy, in behalf of the Trustees of said Glynn County Academy, complainants in said bill, do solemnly swear that the facts stated in the bill are just and true to the best of your knowledge and belief.

JAMES HOUSTON.

Sworn to before me this 20th day of May, 1856.

FRANCIS M. SCARLETT, *J. I. C. G. C.*

AT CHAMBERS, May 20th, 1856.

Read and Sanctioned.

Let the writ of injunction issue, as prayed for, in the sum of thirty thousand dollars.

A. E. COCHRAN,
Judge Superior Court, B. C.

EXHIBIT A.

Election of Trustees for Glynn County Academy by the grand jury for April term, 1855, and on counting out the vote the following is the result:

No. 1. F. M. Scarlett, 15. No. 2. H. F. Grant, 15. No. 3. W. A. Cosper, 15. No. 4. Thomas Bourke, 15. No. 5. H. Dubignon, 15. No. 6. S. M. Timmens, 15. No. 7. S.

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M. Burnett, 14. No. 8. J. W. Moore, 13. No. 9. J. M. Tison, 13. No. 10. James Houston, 13. Wm. Gignilliat, 1. E. C. P. Dart, 2. A. Dart, 2. F. D. Scarlett, 1. Dr. Troup, 1.

A true statement of the Poll.

HUGH FRAZER GRANT, *Foreman.*

The undersigned protest against the Election of Trustees for the Glynn County Academy under the Act of the Legislature at its last session, as being unconstitutional.

HUGH FRAZER GRANT,

U. DART,

WM. ANDLEY COUPER,

THOS. FULLER HAZZARD, M. D.

ALEX. McDONALD,

SILAS W. TAYLOR.

A True Copy of the Record.

Attest—J. W. Moore, *Clerk S. C. G. C.*

EXHIBIT B.

Notice.—All persons are forbid trespassing in any manner whatever on the following lots of land in the Town of Brunswick, Ga., as laid out and designated in a plan of said Town, by George R. Baldwin, Civil Engineer, in the year 1857. Water Lots Nos. 6, 7, 8, 9, 10, 14, 19, 23, 24, and Bay lots Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, and Town lots Nos. 57, 58, 59, 60, 61, 63, 64, 65, 69, 70, 71, 72, 22, 118, 119, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 149, 150, 151, 159, 179, 185, 186, 187, 188, 189, 190, 191, 192, 193, 203, 271, 272, 275, 278, 284, 285, 286, 287, 292, 293, 294, 295, 296, 297, 298, 301, 302, 303, 331, 332, 333, 345, 346, 347, 367, 308, 369, 370, 371, 377, 378, 379, 380, 381, 399, 404, 405, 408, 412, 415, 416, 417, 418, 419, 420, 421, 127, 428, 431, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 477, 478, 479, 480, 481, 512, 513, 514, 517, 518, 519,

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520, 521, 527, 528, 529, 530, 531. The law will be rigidly enforced against all trespassers, whenever such trespassers can be indentified.

URBANUS DART, *Trustee*.

April the 30th, 1856.

To this bill defendants demurred. The Court overruled the demurrer, and defendants excepted on the following grounds:

1st. That the Court erred in overruling the special demurrer of the defendants to the bill of complaint.

2d. That the Court erred in not dismissing the bill of complainants, upon the grounds taken by the demurrer of defendants.

3d. That the Court erred in deciding that the Act of the General Assembly of the State of Georgia, approved 18th of February, 1854, with reference to the Glynn County Academy, was not violative of private right, but was constitutional.

4th. That the Court erred in deciding that the Glynn County Academy was a public corporation.

5th. That the Court erred in deciding that the Trustees of Glynn County Academy, under the original charter, had no vested beneficial interest in the fund, but only a naked power which the State could resume at pleasure.

6th. That the Court erred in deciding that the Trustees chosen by the grand jury of the county of Glynn, were ever duly organized.

7th. That the Court erred in deciding that the complainants not being a majority of the Trustees had a right to file their bill claiming to have the whole fund turned over to them.

8th. That his Honor erred in deciding that the complainants had not a remedy at law adequate to all their rights in the premises.

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LAW, BARTOW & LOVELL; WARD, OWENS & JONES; for plaintiffs in error.

A. G. JEWETT; WRIGHT & SAVAGE, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

It is necessary in the outset, to consider whether the "Trustees of the Glynn County Academy," be a corporation of the class, which constitutes a contract between the State Government and the corporators, within the meaning of that clause of the Federal Constitution which inhibits a State from passing a law impairing the obligation of contracts.

The great and leading case which brings the grant of a charter or an act of incorporation of any sort, within the protection of the Constitution of the United States, as a contract, in the case of the *Dartmouth College vs. Woodward*, 4. *Wheaton*, 518. That judgment has become the law of the land, irrevocable by Congress, and irreversible, except by the tribunal which pronounced it. It is therefore, a controlling authority in this case. The college, whose charter was the subject of discussion in that case, was endowed by private donations. With the statement of this simple fact, we shall proceed, at once, to principles conceded or established in the adjudication of that case, applicable to the case before us. The Chief Justice, in delivering the opinion of the Court remarked that "if the act of incorporation be the grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the College be public property, or if the State of New Hampshire, as a government, be alone interested in the transactions, the subject is one in which the Legislature of the State may act, according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States."

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4. *Wheat*. 639, 630. After reviewing the most essential parts of the charter, he says: "it is apparent that the funds of the college consisted entirely of private donations." *Ib.* 632. His conclusion was, that it was an eleemosynary, and as far as respected its funds, a private corporation. *Ib.* 633-4. The argument of the Court admits that education is an object of national concern, and a proper subject of legislation. The Chief Justice in speaking of Dartmouth College asks, "where then can be derived the idea that it has become a public institution, and its trustees, public officers, exercising powers conferred by the public, for public objects? Not from the source whence its funds were drawn; for its foundation is merely private and eleemosynary." *Ib.* 635. It is said again, that "the character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of the government, created for its purposes." *Ib.* 638. Justice Washington places the right of government and visitation in private corporations for charity, on the property in the lands which the founder assigned to support the charity. *Ib.* 666. Judge Story goes one step further, and says: "if the charter were a pure donation, when the grant was complete and accepted by the grantees, it involved a contract, that the grantees should hold, and the grantor should not re-assume the grant; as much as if it had been founded on the most valuable consideration." *Ib.* 684. For the reasons assigned by the various Judges who delivered opinions at length, a majority of the Court, overruled the judgment of the State Court of New Hampshire sustaining the several acts of the Legislature of that State amendatory of the charter of the college. Judge Duval dissented, but he wrote out no opinion. The members of the Court who concurred in the judgment of reversal, did not agree in the reasons for that judgment, and these reasons

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involved very important principles; but it may be safely, averred, we think, that the controlling reason with a majority of the Court was, that the college was endowed by private donations, and that the charter having been granted in consideration of such donations, it had all the requisites of a contract, and was protected against Legislative interference on the part of the State, by the Constitution of the United States. We feel warranted in saying, that if the government had been the founder of the college, the decision would have been otherwise. At any rate, the *case* is not an authority that the Legislature of a State has no control of an eleemosynary institution, where it is the sole contributor of the fund which supports it, and creates a corporation for the purpose, simply of carrying out its objects. The question as presented in the Dartmouth College case was considered a most important and delicate one, and the opinions delivered by the different Judges, show that it was not without embarrassment. A charter had been granted by the King of England, and at the time of the grant, it was well known to the parties who received the charter, that it was subject to be modified, amended or annulled, at the pleasure of the sovereign power of the Kingdom. The Court, with deference be it spoken, may have experienced some difficulty in arriving at the conclusion, that the law of the land, which recognized this strong, but perhaps necessary power, of modification or repeal, did not enter into the contract and form a part of it. If it did, a mere change of the sovereign power could have no effect upon the contract, but it remained as it was, with all its express stipulations, and subject to all its implied conditions, and among them this power of control.

We will now trace the history of the Glynn County Academy, investigate its rights under the several Acts of the General Assembly, on which it, or the defendants for it, claim exemption from legislative control.

The 54th clause of the Constitution of February 1777,

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declares that "schools shall be erected in each county, and supported at the general expense of the State, as the Legislature shall hereafter point out." *Watkins' Dig.* 15.

The 14th section of the Act for the more full and complete establishment of a public seat of learning in this State, declares that all public schools instituted or to be supported by funds or public monies, in this State, shall be considered as parts or members of the University, and shall be under the foregoing rules and regulations, (being those prescribed for the University.) *Cobb* 1086. Those rules and regulations show that the action of the Board of Visitors and the Board of Trustees, was to be submitted to the supervision of the General Assembly. The first appropriation for an academy in the County of Glynn was made by the Act of 1st February, 1788. Commissioners were appointed for the town of Brunswick who were authorized to survey the town, and to sell all or any of the vacant lots in said town, except such as were reserved for public use, and the monies arising from the sale, were to be applied to the building and support of an academy in said town, and to no other purpose whatever. *Watkins Dig.* 381. The Constitution of 1789, is silent on the subject of education, but it gives to the Legislature power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to the Constitution.

In 1796, the Legislature passed an Act, pretty much the same as the Act of 1788, making provision for the support of an academy or seminary of learning, in the County of Glynn. *Wat. Dig.* 598. In 1797, the Legislature made further provision for said academy. *Ib.* 669. In 1813, the Legislature enacted that the Commissioners of the town and commons of Brunswick, should be Commissioners of the academy, and appointed Commissioners. *Lamar's Dig.* 377. In 1814, the Legislature again appointed Commissioners and authorized them to sue, and subjected them to suit. *Ib.* 378.

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In 1817, the Legislature passed an Act providing for the election of Commissioners of Glynn County Academy, declaring their term of service, and pointing out the mode of filling vacancies. *Ib.* 19. In 1821, an Act was passed to incorporate Glynn County Academy, and five Trustees were appointed, and invested with all manner of property then belonging to the said institution, or which might thereafter be conveyed or transferred to them, to have and to hold the same for the proper use, benefit and behoof of the said academy. *Daw. Comp.* 6. In 1823, two *Commissioners*, in addition to those already in office, were appointed for said academy. *Ib.* 17. In 1829, the Inferior Court of Glynn County, was authorized and empowered to sell the academy building in said county, and to apply the proceeds of the sale to the education of poor children in said county, and for other county purposes. In 1838, five additional Trustees were added to the Board by an Act of the Legislature. *Acts of 1838, p.* 7. At the same session, the Brunswick Academy was incorporated, and the act to authorize the Trustees of the Glynn County Academy to establish free schools in said county was repealed. *Acts of 1838, p.* 11. Without looking further into the Legislation on this subject, prior to the year 1854, we will briefly remark of the Act of February of that year, that it changes the mode of electing Trustees, and requires the then existing Board of Trustees to turn over to the Trustees appointed under that act, all the books, buildings, papers, lands and money belonging to the academy fund.

By the Constitution of 1777, schools erected in the several counties were to be supported at the general expense of the State. The University was established in 1785, and the act establishing it, made all public schools instituted, or to be supported by the State, members of the University, and subject to the same rules and regulations, which placed them under the control of the General Assembly. In 1788, the

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first appropriation was made for the erection and support of an academy in the county of Glynn, and its endowment proceeded from the State exclusively. The Legislature usually constituted new Commissioners for that academy, without reference to former appointments. This was its practice down to the time of the incorporation of certain persons as Trustees of Glynn County Academy, and by that very act, it displaced Commissioners chosen under the provisions of a prior statute, and which Commissioners had been previously authorized to sue and had been subjected to suit. By the act of incorporation, it does not appear that donations had been made to the academy by private individuals, and when it invested the Trustees with all the property, &c. belonging to the institution, it invested them with the property only which had been contributed by the State. The act authorized the Trustees to accept donations, &c. for the academy, but it is alleged in the bill, that its funds and property consist of those exclusively appropriated by the Legislature to its use.

It is therefore not an institution protected by the Constitution of the United States, against the Legislation of the State. 4. *Wheat.* 629-30. But after the act of incorporation, the Legislature continued, as before, to exercise the power of control over the government of the academy. It appointed, first, two additional Commissioners, who acted with the Board as Trustees, increasing their number to seven, and afterwards appointed five other Trustees, and repealed the act in which the two were appointed. It is insisted that this last act is unconstitutional. But it is immaterial to the present enquiry, whether that be so or not. The question is as to the legislative control claimed and exercised over the government of the academy. It was exercised, and its act was acquiesced in, and the new members of the Board, claiming title under legislative appointment, subsequent to the act of incorporation, which fixed the number of Trustees at five, had, of course, a controlling power over the affairs of the in-

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stitution, the two appointed under the Act of 1823 continuing to act after the repeal of the law. If the act of 1854 is unconstitutional, the acts increasing the number of Trustees are equally so, (unless passed at the instance of the Trustees, which does not appear,) and if the Academy had been founded on private donations and incorporated in consideration thereof, these last named acts would have fallen within the decision of the Dartmouth College case, and according to the judgment there rendered, would have been void. But the funds of the Academy are public property, and the Legislature was not, therefore, restricted by any limitation of State power in the Federal Constitution, from passing the Act of 1854.

The opinion of Justice Story, goes farther. He insists that a charter incorporating an eleemosynary institution, whether it be founded on public or private donation, is a contract within the meaning of the Constitution of the United States, on the ground that all corporate franchises are legal estates, that they are powers coupled with an interest, and that the corporators have vested rights in their charter as corporators. *Story on Con.* §1392. In the case of *Allen vs. McKean*, he maintained the same doctrine, and when he referred to the Dartmouth College case to support it, he referred to that part of it which contained his own reasons for concurring in the judgment pronounced by the Chief Justice, and in which reasons, Justice Livingston alone agreed with him. In the Courts of the United States, that decision cannot be considered as authority, until it becomes an established principle that a single associate Justice of the Supreme Court, presiding alone, in his own Circuit, may over-rule a decision of the Supreme Court. We cannot recognize it as authority here. We think the decision of the Supreme Court goes far enough, on reasons concurred in by the majority of the Court, and it is not quite certain that a period may not arrive, when there shall be cause of regret that that Court placed a construction on the

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constitutional power of the States which restricts them from repealing or modifying acts of incorporation of any sort passed by them. The Supreme Court itself declared that it was more than possible, that the preservation of rights of the description then under consideration (corporate rights) was not particularly in the view of the framers of the Constitution, when the clause under consideration was introduced into that instrument. A construction of the Constitution was asked which would restrict a State in the exercise of a sovereign power—a power to control a body of its own creation in the exercise of functions and the enjoyment of privileges granted to it for the promotion of local, but of public interests. Before such a construction was given to it, it ought to have been justified, we are disposed to believe, palpably by the letter and intent of the Constitution. There was no greater danger here, where all the constituent parts of the Legislative power are mediately or immediately representatives of the people, than in England, where only one of its component parts is chosen by the people, that the Legislature would violate the rights of private property by the repeal or modification of one of its acts, granting a charter; or that it would interfere, in any manner, therewith, except when the public interest required it, and except, also, upon ample security against injury to private property, which had been conveyed under the charter to the corporation, or accumulated by it. As evidence of this, it has become the practice in many of the States for the Legislatures, in granting charters, to reserve the power to alter or repeal them at pleasure, thus putting them on the footing they were before the decision of the Supreme Court, and in no case has this power been exercised, within our knowledge, to the detriment of private interests. In every case in which it has been exercised, it has been done with great caution, and in no instance, except in cases where the misconduct of the corporation has made it necessary to the public safety.

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But conceding Judge Story's opinion to be the law of the land, then the act of 1854, was constitutional. If the five Trustees appointed by the act of incorporation of 1821, acquiesced in the subsequent appointment, by the Legislature, of additional Trustees, solely from an impression of the constitutional powers of the Legislature thus to interfere, and it had no such power, this acquiescence amounts to nothing, and did not affirm a void act. From the bill before us we can infer nothing on the subject, as nothing is averred. From the acts of the Legislature it does not appear that the increase of the number of Trustees was petitioned for by the existing Board, but it seems to have been the voluntary action of the Legislature, exercising, as before, its right to manage and control this Academy according to its own discretion. The new Trustees constitute a majority of the Board, and if their appointment was void all their acts are void, and among their acts must of course have been the vote filling of vacancies in the Board. But one of the original members of the Board of Trustees is now a Trustee, the rest are all new Trustees, holding their position either, (according to the premises) by an unconstitutional legislative appointment, or by the election of a body, a majority of whom were incapable, because they held their offices by an unconstitutional appointment. This was the condition of things when the Act of 1854 was passed. Of the legal constitutional corporation, there was, as before remarked, but a single Trustee, and he of course, incapable of holding an election, or of performing any other corporate act. The corporation was then defunct, and incapable of self-resuscitation. The Legislature alone could revive it, and it could revive it upon its own plan, and direct the *œdæ* of a new organization. But we do not put the decision upon this view of the case. We think that the Act of 1821 did not create a corporation of the class that is protected from Legislative interference by the Constitution of the United States.

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The second ground of demurrer is, that the Board of Trustees chosen under the Act of 1854, never legally organized.

This ground is answered by the allegations in the bill, which cannot be controverted in this demurrer. Ten Trustees were elected by the grand jury under the Act of 1854. Four of them refused to accept the appointment, but the other six met and organized, engaged a teacher and took charge of the Academy building. The six, being a majority of the ten, performed these acts. Without pausing to enquire whether the Board of Trustees consisted properly of ten, it is quite sufficient to say that the Legislature considered and recognized the six as a competent Board, by directing the Treasurer to pay teachers employed by them—referring to them as the Board elected under the Act of 1854. *Act of '56, 299.*

We will, however remark, that the title of the Act of 1823, under which two Trustees were added to the Board is, "An act to authorize the Commissioners of Glynn Academy to establish free schools in said county." It has no reference to the appointment of Trustees. The Act of 1836, which appoints five additional Trustees, is subject to the same objection. But the Board elected by the grand jury having been recognized by the Legislature as a legal Board, is sufficient to establish the number which should constitute it without deciding upon former legislation in reference thereto.

The third ground of exception is on the point made in the demurrer, that the Trustees can only act by a majority of the whole number, and it does not appear that a majority have given their sanction to the filing of the bill.

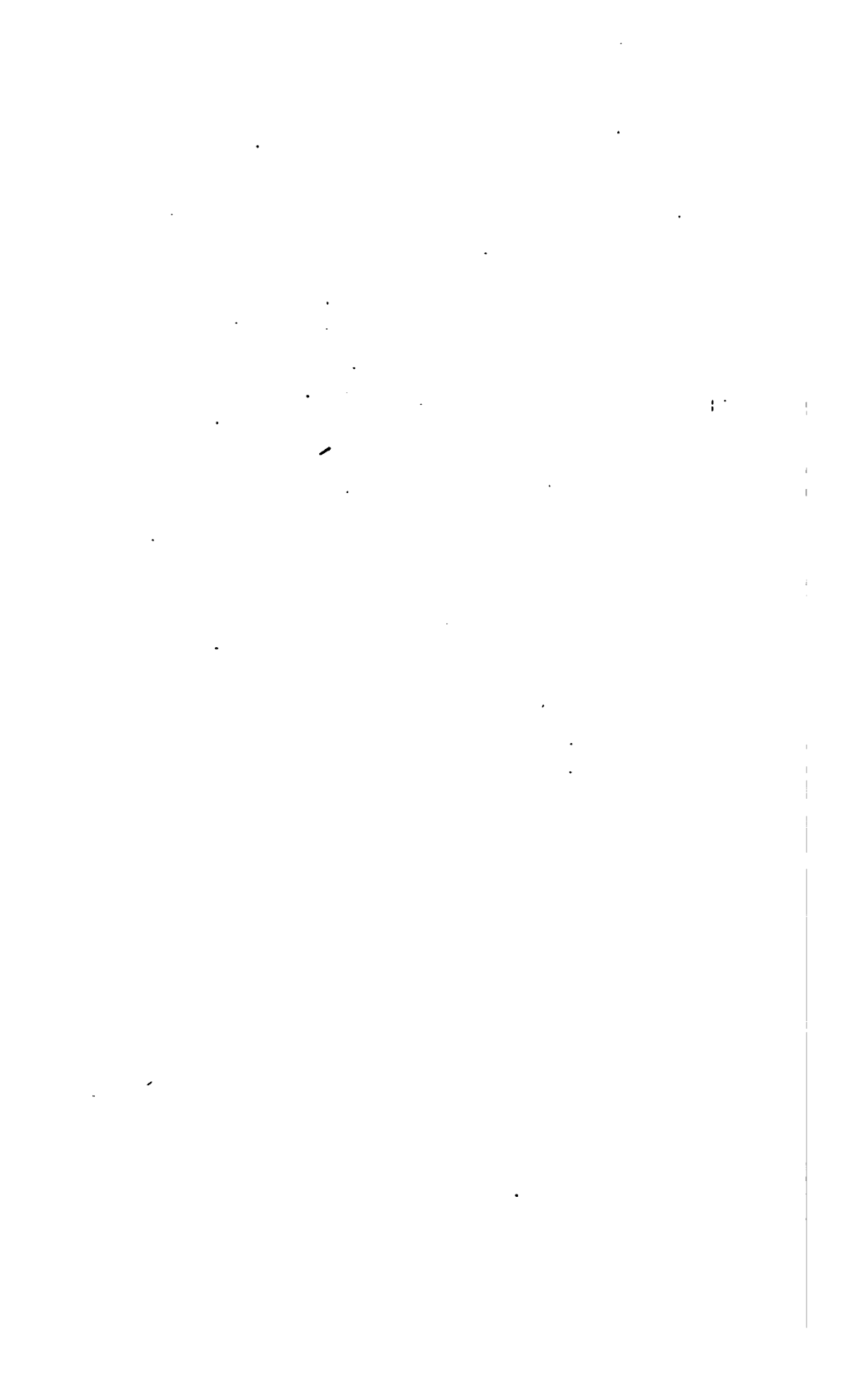
It is true that less than a majority of a board of Trustees cannot do a corporate act unless the charter declares otherwise, but it is also true that when a suit is brought in the name of a corporate body, it is to be presumed to be authorized by the body. If the suit be in the names of members of a corporate body, and they are less than a majority, it cannot be the suit of the corporation, unless the act creating it authorize a less number than a majority to sue as the corpo-

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ration. There is no such authority in this act of incorporation, and the suit being by five, when the board of Trustees consists of ten, the suit cannot be sustained by them as the suit of the corporation. Upon the charges in the bill, however, they may proceed with their suit in their individual names, as citizens of the county of Glynn, and in behalf of the rest of the citizens of Glynn county, by amending their bill, so as to conform to this decision. The complainants, as the bill will stand, can have no higher claim to the possession of the property and funds of the Academy, than other citizens of Glynn county, but as *cestui que trusts*, they can have an account of the property and funds in which every citizen of Glynn county has an interest, from those who have them in hand and have assumed, whether rightfully or wrongfully, to manage and control them. They can ask a decree in regard to the matters charged in the bill, and the funds may be secured, and the Court by its decree can compel their application to the objects for which they were given.

In regard to the fourth and last ground, to-wit: That a *quo warranto*, being a proper and sufficient remedy for complainants, Equity has no jurisdiction, it is sufficient to remark, that the government is not moving in this matter, and has not ordered an information to be filed against the defendants; that a *quo warranto* tries the right only, and gives no relief for breach of trust; that defendants are bound to answer to the grave charges made against them of breach of trust; and there can be no difficulty in settling the right before a Court of Chancery.

Judgment affirmed.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MACON,
JUNE TERM, 1857.

Present—JOSEPH H. LUMPKIN,
CHARLES J. McDONALD, } Judges.
HENRY L. BENNING,

No. 1.—JOHNSON & SLOAN, plaintiffs in error, vs. THOMAS H. CLARKE, defendant in error.

- [1.] If evidence be taken by commission, the case in which it is taken need not be stated in the caption to the answers, if it be stated in the heading of the interrogatories, and is set forth in the commission, and all attached together, are enveloped and sent by mail.
- [2.] If a contract is to be construed otherwise than literally expressed, there must be something apparent in the evidence to justify the Court in so interpreting it.
- [3.] Party making a special contract must comply with it. He cannot voluntarily abandon it against the consent of the opposite party, and recover on a common count, ordinarily.

Assumpsit in Dougherty Superior Court. Tried before ALLEN, Judge, May Term, 1857.

This action was brought by Johnson & Sloan, attorneys at law, against Thomas H. Clarke, to recover the sum of two hundred dollars on the following contract, viz :

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“§ 50. By the 25th of December next, I promise to pay Johnson & Sloan, or bearer, fifty dollars, value received.

January 14th, 1854.

THOMAS H. CLARKE.”

Whereas, Thomas H. Clarke, is about to commence a suit in Muscogee Superior Court for the recovery of certain negroes of and from M. N. Clarke, and whereas said Thomas has retained said Johnson & Sloan in said case: Now the said Thomas in the the event of recovering, agrees to pay said Johnson & Sloan one hundred and fifty dollars, in addition to the sum specified in the above note.

January 14th, 1854.

THOMAS H. CLARKE.

Under this agreement, Johnson & Sloan instituted an action of trover against M. N. Clarke for said negroes, sometime in the year 1854: Pending this suit about the 1st of January, 1855, Thomas H. Clarke and his grand-mother, Mrs. Hinton, came up to Columbus, and by some means got possession of the negroes sued for, and took them off, down to Dougherty county, where they resided, and have held possession of them ever since. At December Term, 1855, the action of trover was dismissed, and Johnson & Sloan claimed from defendant the sum of two hundred dollars; this he refused to pay, and they bring their suit.

Plaintiff's counsel requested the presiding Judge to charge the jury, that if they believed from the evidence that plaintiffs instituted the action of trover for the defendant in pursuance of the contract, and rendered the usual service in the bringing and preparation of the case for trial; and that pending the action, the defendant took the law into his own hands and got possession of the negroes, tortiously or otherwise, plaintiffs were not bound further to prosecute the action, and were entitled to recover in this case for the value of their services, and that if they so believe, they must find for plaintiffs, whatever the evidence shows their services to have been worth; which charge the Court declined to give, but on the

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contrary, charged the jury, that to entitle the plaintiffs to recover more than the note for fifty dollars, it was incumbent on them to prove a compliance on their part with the terms of contract; that is, to show a recovery in the action, or that they were prevented from a recovery by the act of the defendant, the plaintiff in the trover suit. That the taking of the negroes from the defendant in the trover action, was not such an act as prevented the plaintiff's from prosecuting the action to a recovery; that the plaintiff in the trover action might have been entitled to hire, and if he instructed his attorneys to prosecute the action for hire, and they disobeyed the instructions and dismissed the action, they are not entitled to recover, except upon the fifty dollar note.

The jury returned a verdict for the plaintiff's for the sum of fifty dollars; and counsel for plaintiff's except.

1st. Because the Court rejected the depositions of M. N. Clarke and W. S. Clarke.

2d. Because the Court refused to charge, as requested by plaintiff's counsel.

3d. Because the charge given to the jury was erroneous and contrary to law.

STROZIER & SLAUGHTER, for plaintiffs in error.

W. E. SMITH; and R. F. LYON, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

On the trial of this cause in the Court below, the plaintiffs counsel offered in evidence the depositions of Michael N. Clarke and William Scott Clarke, taken by commission. They were objected to by defendants counsel, on the ground that the case was not stated at the heading of the answers.

[1.] The case was stated correctly at the head of the interrogatories and in the body of the commission, and the interrogatories, commission, and depositions, were attached

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together and sent by mail under cover of an envelope, on which the case was properly stated. The Court rejected the evidence. We think the Court erred in ruling them out. There was sufficient evidence that the depositions were the identical answers given under the authority of the commission, to the interrogatories to which they were attached.

[2.] In regard to the other points in this case, we will remark that an important point of the evidence introduced on the trial before the Court below, is not in the record before us, to-wit: the exemplification of the action of trover brought by Thomas H. Clarke vs. Michael N. Clarke. It was for the institution and prosecution of this suit, that the contract sued on was made. The contract is contained in two instruments, one for the payment of fifty dollars absolutely, and the other for the payment of one hundred and fifty dollars, conditionally. The latter instrument recites that Thomas H. Clarke is about to commence a suit, "*for the recovery of certain negroes.*" Nothing is said about the hire. The instrument says further, that in the event of recovering, the said Thomas agrees to pay said Johnson & Sloan one hundred and fifty dollars. Now, there can be no doubt, that, if the cause had been tried and the plaintiff had recovered, the negroes, but, for some cause, the jury had given no hire, the plaintiff in this case action would have been entitled to the hundred and fifty dollars; such are the words of the contract. If the contract is to be extended beyond its words, there must be something to justify the Court in so construing it. It does not appear in the proceedings as exhibited in this record, that, at the time of the institution of the suit, the plaintiff intended to sue for hire. His affidavit to hold the defendant to bail is not before us. He cannot therefore say that he claimed hire. Mr. Williams, who gives evidence of the affidavit, says nothing of the value of the hire claimed.

The plaintiff in the action of trover, directed his attorneys, the plaintiffs here, to make the defendant pay for the hire if they could. He did not seem to claim it. The exemplifica-

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tion of the trover suit, is not before us to enable us to determine, whether the suit was brought for the hire, as well as for the negroes. If it was so brought, it is evidence of the interpretation which the plaintiffs put upon their own contract, and would perhaps have required of us to construe it in the same way, as the hire is usually sued for, when negroes are.

There are peculiar circumstances in this case, which may have induced the plaintiff to forbear to claim it. And, on the whole, it may be safest to consider that the parties expressed their contract as they intended, and that the desire of the party was to recover the negroes. The plaintiffs in this action was bound to execute their contract, and was not bound by the instructions of their client if they went beyond the requisitions of the contract.

[3.] From the evidence in this cause, if the plaintiffs were entitled to recover at all, they must have recovered on their contract, and not on a *quantum meruit*, or *quantum valebant*. They voluntarily abandoned the suit, and if they did that contrary to their contract, they are not entitled to recover at all, the other party having derived no benefit from their services.

The Court below having erred in rejecting the evidence of the witnesses Clark, and not having charged the law of this contract as we construe it from the evidence in this record, his judgment must be reversed.

Judgment reversed.

No. 2.—RANDAL S. JORDAN, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] In an indictment for the murder of a slave, it is not necessary to aver that the slave was not in a state of insurrection at the time, nor that the death did

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- not happen by accident, in giving the slave moderate correction. Such matter must come in as a defence.
- [2.] When a new county is formed from an old one, and before its formation a crime was committed on the territory taken from the old county, the indictment is correct if it charge that the offence was committed in that portion of the old county which was taken to form the new one.
- [3.] Motion to quash an indictment and motion for a verdict of acquittal because of alleged defects in the indictment are in the nature of a demurrer, which must be filed by way of demurrer on arraignment and before plea pleaded.
- [4.] Presiding Judge is the trier of the competency of jurors, and his judgment in regard to the competency, will be seldom interfered with.
- [5.] It is not sufficient to disqualify a person as a juror to prove that he was born without the United States. It must be shown that he has not been naturalized, which may be done by his own oath, or by any competent evidence the party may be able to produce.
- [6.] It is no ground for a new trial that the panel of the jury put on the prisoner does not number forty-eight, if he does object at the time the panel is put on him.
- [7.] On the indictment of a manager or overseer for the murder of a slave, that the owner furnished him with the instrument with which the killing was effected, is no evidence.
- [8.] That the prisoner struck the father of the girl beaten, to prevent his coming to her aid or relief, when in a dying condition, is admissible as evidence of malice against the girl.
- [9.] The finding of the accused guilty of manslaughter on an indictment for murder, is an acquittal of the charge of murder, and if the Court be of opinion that the finding was wrong, and ought to have been for murder, it cannot grant a new trial.
- [10.] The Act of 1799, to carry into effect the 12th section of the 4th article of the Constitution, is not repealed by the penal code of 1833.
- [11.] If on an indictment for murder the jury find the accused guilty of manslaughter, it is an acquittal as to the charge of murder, and if the Court believe him to be guilty of murder, it cannot grant a new trial.

Indictment for murder in Dougherty Superior Court. Tried before Judge ALLEN, June Term, 1857.

Randal S. Jordan was indicted for the murder of a negro girl named Mariah, the property of John H. Dawson.

Prisoner's counsel moved to quash the indictment, on the ground that it was not alleged, that the slave was not in a state

of revolt, or the killing did not happen while inflicting moderate correction.

The Court overruled the motion, and prisoner excepted.

After reading the *indictment*, and before any testimony was introduced, prisoner's counsel moved for a verdict of not guilty, on the grounds that the indictment showed that the crime was committed in the *County of Baker*; and did not charge that the killing did not take place while there was an insurrection or revolt, or that the death did not happen by accident in giving such slave moderate correction.

The Court overruled the motion and prisoner excepted.

• In making up the jury, prisoner's counsel moved to put John S. Moreman upon triors, and to be allowed to prove that said juror had formed and expressed fixed opinions, and proposed to introduce the juror himself, to prove that fact, and to ask him if he had not formed and expressed a fixed opinion. Counsel stating that the juror himself was the only person by whom they could prove the fact, within their knowledge.

The Court refused the motion, and put the juror upon the prisoner, and his counsel excepted.

The prisoner put *Robert Bears* upon triors, and with the consent of the State, asked him, if he was not a partner of John H. Dawson, the prosecutor, and if he had not had frequent conversations with him and others, and if from these conversations he had not formed an opinion which he now entertained? to all of which he answered in the affirmative. The counsel for the State then asked him if he would not be governed entirely by the evidence and find a verdict accordingly? To which question counsel for prisoner objected, and the Court overruled the objection, and the juror answered that he would. Prisoner's counsel then asked him if it would not take a greater amount of evidence to remove that opinion than if he had heard nothing about the matter? He

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replied, that perhaps it might. Prisoner's counsel objected to his being put upon prisoner, the Court overruled the objection, and held the juror competent, and prisoner excepted-

James Harlett, a juror, being called, was asked by prisoner's counsel (before the oath prescribed by Act of 1856, was administered to him) if he was not born without the limits of the United States? To which he replied that he was; counsel for the State asked him, if he had not been naturalized, and exercised the rights of a citizen? To which question prisoner objected. The Court overruled the objection, and the juror answered that he had, upon which the Court pronounced him competent, and he was put upon the prisoner and challenged, and prisoner excepted.

There were but forty-seven jurors put upon prisoner in the last panel, the prisoner not knowing it until afterwards, when the name of John Rutland, one of the forty-eight was called, and he failed to answer, and was not in the Court-House at the time the panel was put on prisoner. He was sent for, and being brought in, was asked if he was put upon prisoner with the other forty-seven; he replied that he was not. Prisoner objected to the array on this ground. The Court overruled the objection, and the juror was put upon prisoner, but disqualified himself on the question as to partiality, and prisoner excepted.

The jury being made up, the following evidence was submitted on the part of the State.

Allen T. Mallard, testified, that he knew a negro girl by the name of Mariah, the property of John H. Dawson, and was present at her death on the 23d July, 1853, in then Baker, now Dougherty county. Defendant was overseeing for Dawson on the plantation of Dawson & Collier at the time. Mariah was taken and brought to witness by another negro girl, and he gave her up to Jordan, who took her and whipped her some time with a strap; thought Jordan was excited.

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and after he had whipped her a while, called to him to stop; don't know whether he heard or not; he continued whipping her awhile longer, and then let her up. She had been dropping peas and had a vessel to drop from, and after he let her up, she went towards the vessel, and, as she went defendant continued to strap her, following after her as she went towards the corn, and directly, witness heard some of the negroes who were working in the field hollow out; "Mr. Jordan has killed Mariah." When witness came up to her, she was dying, or had fainted, and had a white froth on her lips. Jordan remarked, that he thought she was "possoming." Witness said he thought not. Jordan then sent after Dr. Dickinson, and made a negro boy take Mariah to the house. When she arrived there, if not dead, she could not breathe as far as witness could see. They put mustard to her wrists and ankles, and witness started home and met Dr. Postell, who had been sent for. Witness returned with him and when he reached the house, the girl was perfectly dead. Witness had been gone only a few minutes, not more than five or ten; thinks it was not more than fifteen minutes from the time they left the field. The whipping took place in the field. Witness was some five steps off when Jordan began to whip the girl, not more than ten steps. The girl was not confined; Jordan had her down on the ground; he would push her down. The strap was a leather one, very thick; commencing at the butt three ply, and after eight or ten inches two ply, and then one ply; the strap had a leather handle; was made of sole leather; cannot say how thick. Jordan held her sometime in one position and then in another, whipping her sometime in one place and then in another. Does not know how old she was; she was not twenty years old; large enough to plow; was about half grown. Witness thought he called to Jordan loud enough for him to hear; he spoke low, because he did not want the negroes to hear him. Jordan would sometimes turn her on her all fours; sometimes on her belly; sometimes had her head down, and sometimes

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up; don't know how long he was whipping her; it may have been half an hour, probably not so long. He had her head confined at one time; does not recollect his placing her head between his legs. When he had her head under his knees, he held on to her clothes. When he let her up she appeared stullen, as if she would not do what she was told; she staggered a little as she went off. Jordan strapped her sometimes on her back and sometimes on her hips. The girl was twenty or forty yards off when witness came up. Jordan was walking beside another negro, who appeared determined to go where the girl was lying, and appeared to be attempting to keep him off; thinks he struck the negro boy with his strap; the boy was named Spencer. Does not know what he struck him for; the boy had disobeyed Jordan's orders, and was trying to come where the girl was lying. Spencer was the girl's father as witness thinks. Mariah was lying down when witness saw Jordan with Spencer. The straps could be heard by witness; he cannot say how long it was after the strapping commenced before he heard the cry that "Mariah was dead." Spencer was not working far from where the girl was, and when witness got up there, he was up very close. Cannot say how many licks Jordan gave her. Witness was excited and might not make a correct estimate, but thinks there was between four hundred and a thousand. The strap made a great deal of noise, but cannot say how hard they were, as they usually make a great noise. The girl seemed to be suffering great pain. Does not think it was an hour from the time the whipping began, till she died. When she was carried and delivered to Jordan, she seemed to be well. Witness had not whipped her while in his possession.

Cross-Examined.—Cannot say how many lashes were inflicted; there was nothing extraordinary in the way the girl was held, as far as witness saw. There was nothing unusual in the way she acted when she was whipped; when she went off she looked stullen or bewildered, or determined not to do what she was told. Jordan remarked to witness when

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he came up, that she was playing possum. Does not know how long Jordan had been there; he had been there but a short time. Thinks he has seen Mr. Collier one of the partners with the strap. Does not know that it is a common thing to use such things. He never saw but one before. They are used to keep from drawing blood like a cowhide; never used one. Thinks a person using one might hurt a negro worse than he had any idea of.

Re-Examined by State.—The difference between the straps commonly used, and the one Jordan used is, that his was much heavier. It happened about 11 o'clock in the morning; it was very warm. Corn was growing in the field, and it was as high as witness' head; this fact made the field much more oppressive and hot. Witness did not say he saw that strap in Mr. Collier's hands, but one like it. It was frequently carried by him at his saddle.

Re-Examined by Defence.—It is not the habit of the country where an overseer is placed upon a plantation for the owner to leave the whip upon the place, and the overseer generally has the whip that is given to him, and if his employer had a preference would use it. Thinks he saw the strap which Jordan had in Mr. Collier's hand or at his saddle.

Re-Examined by State.—Is not an overseer now, but was at the time of this occurrence.

Again by Defence.—Was overseeing at the time on the plantation of Col. Lawton. Does not know the extent of the girl's exhaustion at the time she was brought in. She was brought in as a runaway.

Capt. N. R. Roberts.—Saw the negro girl at Dawson's house after she was dead. Was on the inquest. She was in the piazza; had the appearance of having been severely whipped; she seemed to have been cut to the bone on the thigh, and the wounds were filled with clotted blood; was the worst whipped girl he ever saw; examined her back and found no gashes. It was extremely hot, in July; thinks she was about

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thirteen years old. The strap seemed to be three double; thinks there ought to be a great difference made in the correction of negroes, and would not think of whipping a girl of that size with more than a switch. Dawson and Collier were both absent. Jordan was present at the inquest. The girl was cut on the thigh by Mr. Keaton, to see how far she was cut, and it was black and blue, and filled with clotted blood.

Cross-Examined.—Would not keep such an instrument on his place as the strap he saw. The thigh was cut by Keaton at or about the time the physician's were present; would not use such a strap even if the owner of the place had given it to him. Witness could have killed a three-year old bull with it. If the owner of the place had ordered the overseer to use such a strap, he probably would have been expected to obey orders.

A young man with such an instrument in his hands might do much more harm than he was intending to do. Would not suffer such a strap to be used on his place.

Re-Examined.—Would not have whipped any sort of a negro with such a strap. Any man of common sense ought to know that a negro ought not to be whipped with such a strap, and if whipped with such a one it ought to be given very lightly.

Dr. John T. Dickinson.—Witness is a practicing physician; was sent for by Mr. Jordan in July, 1853, to see Mariah, a negro girl, at the plantation of Mr. Dawson. She was dead when he saw her; seemed to have been whipped to death; the blows were inflicted on her back, thighs and belly; she was bruised all over. The bruises were down to the muscles. The blood was clotted in places. The whipping was the principal cause of her death.

Cross Examined.—Witness and Dr. Postell made a very careful post-mortem examination. They opened the skull. The whipping seemed to be the immediate cause of her death,

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and to have produced the rushing of the blood to the head, which was the cause of her death. She seemed to have died from appoplexy, caused by the whipping. Other causes produce this rushing of blood to the head; running or exercise might cause it: it being somewhat a matter of uncertainty, which might have caused this appoplexy. The brain disclosed the fact that she died from appoplexy.

Re-Examined by State.—A person whose throat is cut or stabbed to the heart, dies of hemorrhage; this negro he thinks, died from the whipping.

Re-Examined by Defence.—Appoplexy is produced by various causes. Thinks the whipping or the position the negro was in while receiving the whipping, was the cause of this attack. Appoplexy is produced by various causes, and cannot state what position the negro was in while being whipped.

The jury found the defendant guilty of voluntary manslaughter, and recommended him to the mercy of the Court.

A motion was made in arrest of judgment:

1st. Because the indictment does not charge that the killing did not take place while the slave was in a state of revolt or insurrection, and did not happen by accident in giving such slave moderate correction.

2d. Because the indictment does not charge the offence to have been committed in the county of Dougherty, but shows that it was committed in the county of Baker, or in that portion of Dougherty which was then Baker, at the time the offence was committed.

The Court overruled the motion in arrest of judgment.

A motion was then made for a new trial, on the grounds taken in the motion for arrest of judgment and upon the rulings and decisions excepted to in the formation of the jury above stated, and further:

Because the jury found contrary to law.

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Because the jury found contrary to evidence.

Because the jury found contrary to law and evidence.

Because the Court erred in charging the jury that it made no difference whether the owner of the slave furnished the instrument with which the killing took place, or not, he having admitted that the instrument was furnished by the employer;—which charge had a tendency to weaken the defence and was an expression of an opinion as to what had been proven.

Because the Court erred in admitting the testimony of the witness, Mallard, as to the prisoner whipping Spencer, the prisoner objecting, and the Court overruling the objection.

Because the jury found contrary to law and evidence in this, that they found voluntary manslaughter, which from the evidence could not be true.

Because the Act of 1799, under which defendant was tried, is repealed by the Penal Code of 1833.

The Court refused the motion for a new trial, and defendant excepted.

STROZIER, WARREN and SLAUGHTER, for plaintiff in error.

Solicitor General Evans, represented by McCAY and R. F. LYON, for the State.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The motion in arrest of judgment ought not to have been sustained, and in our judgment the Court below committed no error in overruling it. The twelfth section of the fourth Article of the Constitution does not define what shall constitute the murder of a slave, but only declares that the maiming or killing a slave, shall be established by like proof, and subject to such punishment, as in case the same offence had been committed on a free white person. It is restrictive of the power of the Legislature. The exception does not alter the case. That is permissive to the Legislature. If a slave be killed in a state of insurrection, or if the death should

happen by accident in giving the slave moderate correction, the Legislature may mitigate the punishment, or relieve the accused party from all punishment. The statesmen contemporary with the Constitution construed that provision of the Constitution as we do, and passed an act to carry it into effect. *Cobb* 982. It has never been held that, in indictments for the murder of a white person, after charging the offence in the usual manner, there must be negative averments, that it was not done in self-defence, and that the danger was not so urgent and pressing at the time of the killing, as to render it absolutely necessary, to save his own life. This is a separate section of the Penal Code. *Sec. XV. Cobb* 785. This must come in as a matter of defence. So in the case of killing a slave. If murder be charged, and the killing was justifiable under the law, it must be brought in by way of defence.

“If a clause of exception contained in the same statute, excuses a person under such and such circumstances, or gives license to persons so and so qualified, so as to excuse or except them out of the general prohibitory words, that must come by way of plea or evidence, that the party is not within such general prohibition but excepted out of it.” *Res. vs. Pemberton, 2. Bur.* 1036. That case was an indictment for exercising the occupation of a tanner, not having served an apprenticeship therein for seven years. The defendant contended that the statutes allowed certain persons to exercise the trade without having served such apprenticeship, and that the indictment ought to specify the qualifications of such persons, and to show that the party is not within any of them. The principle is the same.

[2.] The indictment charges that the offence was committed in that portion of the county of Baker which is now the county of Dougherty. The place where the homicide was committed, is in the county of Dougherty; the plaintiff in error was indicted in Dougherty county, and he was tried in Dougherty county, but it so happens that at the time of the

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commission of the offence, there was no Dougherty county, that it has been laid out since; and that within its defined boundaries is the place at which the homicide was committed. It was in the county of Baker before. We think that it is sufficiently charged in the indictment that the offence was committed in the county of Dougherty. The defendant could not have been prosecuted in the county of Baker, at the time the indictment was found; for the territory on which the alleged offence was committed, was no longer in the county of Baker. The Constitution fixed the place of trial, for the benefit of defendants or parties accused, in the county where the offence was committed, as the locality at which he could most conveniently secure the attendance of witnesses. The change of the name of a county cannot operate to his detriment in any way, nor can the change of a county line.

[3.] The two first grounds in the motion for a new trial are disposed of by what we have said on the motion in arrest of judgment. But we will say additionally that the objection to the indictment ought to have been made by demurrer in writing, at the arraignment, before plea pleaded. It was too late afterwards. See case lately decided at Savannah, *Thomasson vs. State of Georgia*. Motion for a verdict for a defect in the indictment is, in effect, a demurrer.

[4.] This Court has held that under the Act of 1856, the presiding Judge is the trior of the competency of jurors. *Reid vs. The State*, 20. *Ga. Rep.* 688. The third ground in the motion for a new trial was therefore properly overruled.

The juror Robert Bears was examined as to his competency. His evidence was fully heard, and he was pronounced competent by the presiding Judge, who was the trior, whose judgment, we are not prepared to say, was such as to call for our interference. *Costly vs. The State*, 20. *Ga. Rep.* 629.

[5.] Daniel Hartlett the juror was asked before the statutory oath was administered, in regard to his birth place, and he replied that he was born without the limits of the United States. It was no evidence of disqualification if he was not

born within the limits of the United States. If he was a free white male *citizen* of the age of twenty-one years, he had one of the qualifications of a juror. *Acts of 1855 & 1856, 229.*

If a person be drawn from the jury-box, or summoned by the Sheriff as a *tales* juror, he is presumptively a qualified juror. The Sheriff is not to be presumed to have returned a disqualified person; but if a person not qualified shall be returned on a jury, he shall be discharged on the challenge of either of the parties and proof thereof; or on the juror's own oath. *Cobb 546.* The juror answered that he was born out of the limits of the United States; but that did not overcome the presumption of qualification, for his return on the panel of the jury implied that, if he was born the subject of another government, he had been naturalized here.

[6.] That the last panel put on the prisoner, consisted of forty-seven instead of forty-eight jurors, does not entitle him to a new trial. The prisoner was entitled to a list of the jury, who are to be called over before they are put on him, and it is his own fault, if the juror does not answer to his name, that he does not insist on his being brought into Court, or if that cannot be done, that his place be supplied. In this case the prisoner lost nothing, for the juror was set aside for cause.

[7.] In the charge of the Court to the jury that "it made no difference, whether the owner of the slave furnished the instrument with which the killing took place or not," there is no error. If the owner furnished the instrument to the prisoner *for the purpose of killing the slave*, instead of exculpating him, or mitigating *his* offence, it would have made the master accessory to the crime. Almost every master who employs a manager furnishes him with an instrument for giving moderate correction, to be used if necessary for self-protection, but he never intends that it shall be used for inflicting cruel and unreasonable punishment.

[8.] We think there was no error in admitting the evidence

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of the prisoner's striking Spencer. Spencer was the father of the girl who had been whipped. He witnessed the cruelty. She was then lying dead or dying, and the prisoner's refusal to allow her father to go to her aid and relief under these circumstances, was certainly evidence of deeply seated malice against the girl he had beaten. It was proper for the consideration of the jury.

[9.] The counsel for the prisoner moved for a new trial on the ground that from the evidence, the jury could not, according to law, find a verdict of voluntary manslaughter. The jury were the judges of the law and the facts. In their finding they have passed upon both.

They must have found that the prisoner intended to kill the slave, and in this respect, the Court is not disposed to come to a different conclusion: but although the jury have found, in the proof submitted to them, some circumstances which, under the law, they thought justified them in reducing the crime to manslaughter, we confess that it is difficult for us, under our construction of the law, to come to the same conclusion. The State does not and cannot move for a new trial. If we order a new trial, it must be on the ground that, according to our judgment, the prisoner is guilty of murder. He was indicted for murder. The jury found him guilty of voluntary manslaughter. This finding acquits him of the charge of murder, and however contrary to law it may be, the Court cannot grant a new trial, so as to subject him to a trial for the offence of which the Court may believe him to be guilty. The same section of the Penal Code which says that the jury shall be judges of the law and the fact, declares that on the acquittal of any defendant or prisoner, no new trial shall, on any account, be granted by the Court. §309 *Penal Code. Cobb 835.*

[10.] The Penal Code does not repeal the Act of 1799, under which the defendant was put upon his trial. It repeals a great many acts specially mentioned therein, but that act is not among them. There is nothing in the Act of 1799, which

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militates against the Act of 1833, and the general words of repeal do not therefore affect its validity.

[11.] If the verdict be contrary to law, contrary to evidence, or contrary to law and evidence, a new trial ought to be granted, except that if the Court believe the accused is guilty of murder, and the jury, being judges of the law and the fact, have acquitted the prisoner of murder, with which he is charged, by finding him guilty of an offence of lower grade, the Court is expressly forbidden to grant a new trial in such case. I have looked in vain through the evidence for a single mitigating circumstance in this case to reduce the crime below the grade of murder. The prisoner had power over the slave. He exercised it most cruelly, inflicting on her a beating, from four hundred to a thousand blows, which showed in the language of the law "an abandoned and malignant heart." We cannot think that he was, on any of the grounds, entitled to a new trial.

Judgment affirmed.

**No. 3.—JOHN W. FLETCHER Adm'r. et al. plaintiffs in error,
vs. PETER FAUST, et al. defendants in error.**

[1.] Sureties, against whom an administrator on the estate of a deceased distributee, and the guardian of another distributee have instituted suits, are entitled to discovery of the amount that each of the distributees has received in any manner from the estate.

[2.] The answer that neither the administrator nor the guardian has received any thing, and they did not believe said distributees had, is not sufficient.

In Equity, in Sumter Superior Court. Decision by Judge ALLEN, at March Term, 1857.

Fletcher, adm'r, et al. vs. Faust et al.

This was a bill filed by Jesse Hardy, Peter Faust, and Andrew J. Williams, complainants against John W. Fletcher, Sterling Glover and others.

The bill sets forth that one Eason Smith was appointed administrator of Noah Golding, deceased, and that complainants with one James K. Daniel, since dead, became his sureties. That at the time, Smith and Daniel were partners in merchandizing; that Smith sold the estate of his intestate Golding, converted all the assets into money; paid off portions to some of the distributees, and loaned the firm of Smith & Daniel about two thousand dollars. That about 18 , Daniel died, leaving a large estate and a will, and appointed Sarah H. Daniel, Executrix. That Smith has also departed this life, intestate, and insolvent, and Griffin Smith has been appointed administrator of his estate.

The bill further charges, that three suits at law have been commenced, and are now pending against complainants as sureties of Smith, on the administration bond, by the heirs of Golding, and that they are subject to many more actions on said bond, there being about sixteen distributees of Golding's estate. That some of these distributees were fully or partially paid off by the administrator in his life-time, and the vouchers, receipts, and papers that would show the payments and settlements, are in the hands of Griffin Smith, his administrator.

The bill prays that the actions at law be enjoined; that an account be taken of the estate of Golding, and the payments made by the administrator to the distributees; that the executrix of Daniel may set forth what amount of the estate was loaned to or carried into the firm of Smith & Daniel, and that the same be accounted for, and that Griffin Smith, the administrator of Eason Smith, do account for and set forth the value of that estate, and that the same be applied in discharge of Eason Smith's liability to the heirs of Noah Golding, in preference to any other claims or demands, and in aid and relief of complainants.

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John W. Fletcher the administrator of Delila A. Golding, deceased, one of the heirs at law of Noah Golding, and Sterling Glover, guardian of one of the infant heirs at law, and both of whom had commenced their actions at law against complainants on said administration bond, filed their joint and several answer to the bill. They admit the facts alleged in the bill, as to the death of Noah Golding; the appointment of Eason Smith as administrator, and complainants and Daniel suretyship to his bond; the death of Smith and Daniel, as charged in the bill, and that they have commenced suits on said administration bond. But they deny that the parties they represent have ever received any part of their share or interest in said estate of Noah Golding; nor do they know what amounts have been paid to the other distributees. They know nothing of the sum loaned or advanced to Smith & Daniel, nor does such fact, if true, at all affect complainant's liability to them; and having answered fully, and sworn off all the Equity of said bill, they pray a dissolution of the injunction. And further, they demur to said bill for want of Equity, and pray that the same be dismissed.

After argument, the Court refused the motion to dissolve the injunction and to dismiss the bill, as to defendants Fletcher and Glover; and they, by their counsel, except.

SCARBOROUGH and WARREN, for plaintiffs in error.

McCoy & HAWKINS, for defendants in error.

By the Court.—McDONALD, J. delivering the opinion.

The bill filed in this case is demurred to for the want of Equity, or what is the same thing, the motion to dissolve the injunction, is based partly on the allegation that there is no Equity in the bill. The parties moving in this case represent, the one as administrator and the other as guardian, heirs at law of intestate. There is no complaint in the bill that

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There is any difficulty about Golding's estate, except difficulties growing out of the misconduct of his administrator. That the administrator has loaned a part of the money of his intestate to a partnership of which he was a member is no ground for arresting suits by the heirs at law. That may be the gravamen in their case. Charges of that and the like character constitute no ground of Equity.

Nor is there any necessity for, or right in the complainants to enjoin the suits of these defendants, on the ground, that there are vouchers in the hands of their principal's administrator, that they cannot technically describe so as to have them produced at the trial. There is no necessity for a technical description of the papers to have them produced. A very general description will be effectual to compel their production. That is a matter, however, with which these defendants have nothing to do. But there is a charge that each of the distributees has received a portion of the said estate, but how much and at what times, the complainant's cannot establish without resorting to the consciences of each of them. The complainants are entitled to this discovery at least, and that is sufficient to require the Court to hold up the bill. The parties move to dismiss the bill on the additional ground, that they had answered, and all the Equity in the bill was sworn off. Many of the charges in the bill are admitted to be true; but none of these present any Equity. The charge on account of which we think the injunction should be retained, has not been satisfactorily answered. John W. Fletcher's denial is, as to himself, that he has never, as administrator, received one cent of his intestate's share. This is positive. He says further, that he does not believe that his intestate did, for she died an infant under twenty-one years of age. The same remarks may be made in respect to Sterling Glover's answer. The intestate of Fletcher and the ward of Glover, must have been supported from their father's estate, and, to that extent, must have received something. But the ground on which we hold up the injunction

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is, that they cannot know what the intestate and ward had received, or, if they can and do, the answer is not made in a manner to entitle them to a dissolution of the injunction.

Judge not affirmed.

No. 4.—WILLIAM DANIEL, claimant, plaintiff in error, vs. SPALDING, THOMAS & VAIL, plaintiffs in *fi. fa.* defendants in error.

W. executed to plaintiffs in *fi. fa.*, a mortgage upon a house and lot in the city of Columbus, dated 1st of January, 1854. The mortgage *fi. fa.* issued 1st of July, 1856. D. had a deed from the Sheriff of Muscogee county, for the premises, which he bought at a sale made by the Sheriff, under a general judgment, younger than the mortgage, but obtained before the foreclosure of the mortgage, the judgment being dated the 1st of June, 1855. D. offered to prove that G. held a mechanic's lien upon said house and lot for \$2,000, unpaid at the time claimant purchased, and that he had not received any notice from the mortgagee (other than through the registry of the mortgage under the statute,) of the mortgage.

Held, That the testimony tendered was irrelevant to the issue.

Foreclosure and Claim, in Muscogee Superior Court.
Decision by Judge Worrill, May Term, 1857.

This case was heard upon the following agreed statement of facts.

James D. Williford executed to plaintiffs in *fi. fa.*, a mortgage upon a certain house and lot in the City of Columbus, dated 1st January, 1854. This mortgage was foreclosed and the mortgage *fi. fa.* issued 1st July 1856. At the time the mortgage was executed, the mortgagor was in possession of the property and had a right to make the mortgage. Claimant has a deed from the Sheriff of Muscogee county, for said

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house and lot, which he bought at a sale made by the Sheriff under a general judgment younger than the mortgage, but obtained before the foreclosure of the mortgage. The judgment being dated 1st June, 1855.

Claimant, under this state of facts, offered to prove that R. E. Goetchieus held a mechanic's lien upon said house and lot for \$2,000, in force at the time claimant purchased, and that he had not received any notice from the mortgagee (other than through the registry of the mortgage under the statute) of the existence of the mortgage.

Plaintiff in *fi. fa.* objected to this evidence as irrelevant; the Court sustained the objection and repelled the testimony, and claimant excepted.

R. J. MOSES, for plaintiff in error.

E. G. DAWSON; and WELLBORN, JOHNSON & SLOAN, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Whatever may be the rights of Goetchieus, the carpenter, under the Act of 1834, (*Cobb 555*), we are clear that the Court was right in holding, that they could not be invoked by the claimant to support his title in the present issue. The only question being, not whether the mechanic's lien was good, but whether the purchaser at Sheriff's sale, under a junior common law judgment could be protected against an older mortgage lien, duly recorded?

The testimony tendered was irrelevant to this issue, and properly excluded.

Judgment affirmed.

NO. 5.—FRANCIS M. MIZE, claimant, plaintiff in error, vs
HENRY N. ELLS, defendant in error

The claimant is entitled under the Act of 1821, (*Cobb* 533) to withdraw his claim on the first trial and before there has been a verdict for damages awarded against him, at any time before the jury retire from the box.

Claim in Sumter Superior Court. Decision by Judge ALLEN, at March Term, 1857.

The Sheriff of Sumter county, by virtue of a *fi. fa.* issued at the suit of Henry N. Ells vs. Mize & Dupree, levied on two billiard tables as the property of defendants.

Francis M. Mize interposed his claim to the property levied on, and the case was submitted to a jury. After the evidence on both sides was closed, and before the jury retired, claimant proposed to submit to a verdict, which being declined, he then moved to withdraw his claim, which the Court refused to allow.

The jury retired and found the property subject to the *fi. fa.*, and twenty per cent. damages on the amount of the debt.

Claimant moved for a new trial, on the ground, that the Court erred in refusing to let claimant withdraw his claim, before the jury had retired to make up their verdict, and because said verdict as to the damages was against the evidence.

The Court refused the motion for a new trial, and claimant excepted.

HUDSON, represented by STUBBS & HILL, for plaintiff in error.

JNO. R. WORRILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

By the Act of 1821, (*Cobb* 533,) a party may withdraw his claim once at his own instance, and without the consent

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of the plaintiff in execution. May this privilege be exercised on the first trial, at any time, before the jury have retired to consider of the case? We see nothing in the statute itself, nor in the reason of the law, which restricts the exercise of this right, as was done by the Court in this case.

Our judgment consequently is, that the decision below be reversed.

Judgment reversed.

No. 6.—**BENJ. O. KEATON**, plaintiff in error, vs. **ELIZABETH MUSGROVE**, Adm'r., defendant in error.

When four years have elapsed and no action been had upon a motion for a new trial, the jury have a right to infer that it has been abandoned, or that it is kept pending collusively, where the liability over of the successful party in the suit, is dependent upon the termination of the litigation.

Complaint and motion for new trial, in Baker Superior Court. Tried before Judge POWERS, at December Term, 1856.

This was an action by Elizabeth Musgrove, administratrix of Kinchen Musgrove, deceased, for the use of another, against Benjamin O. Keaton, on the following instrument, to-wit:

“This is to certify that I have this day traded for a note on Needham Collier, principal, \$800. I bind myself when collected, to pay Kinchen Musgrove five hundred dollars, with interest from this date. July 4th, 1837.

(Signed,)

B. O. KEATON.

Test, L. D. HALL.

Credited thus: “Received on the within, in notes on S. G. Musgrove and some money, one hundred and seventy-two dollars, this 18th November, 1837.

(Signed,)

M. T. MUSGROVE.”

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“Received on the within, twenty-five dollars, this 18th November, 1837.

“Received on the within, fifteen dollars, this 5th December, 1837.”

Defendant pleaded the general issue, payment, and the statute of limitations.

Plaintiff proved by Needham Collier, that in 1836, he gave his note to John Musgrove for \$800, and that afterwards, he understood that it was traded to Mr. Keaton in 1837; he had a settlement with Keaton in regard to matters between them, and in the settlement he paid Keaton some fifteen hundred dollars, and about \$750 of which was to go upon said note, provided Keaton was successful in defending an action of trover, then pending in Baker Superior Court, at the suit of Larkin E. Musgrove, administrator of John Musgrove, deceased, against said Keaton, for that note.

The understanding was, that if Mr. Keaton gained the lawsuit the payment was to be placed on said note; that if said suit was not gained, Keaton was to refund said amount; that he took a receipt from Keaton to this effect. Never saw the note in Keaton's hand. It never has been given up to him. The note shown him by defendant is the one alluded to. He got possession of the receipt sued on by an advance of \$120, and held it for his reimbursement after he went to Hawkinsville in 1843; that he turned it over to Samuel Clayton to collect it out of Keaton; does not know whether Clayton sued or not.

Defendant offered in evidence the note of Collier, referred to, which is as follows:

“\$800. On the 1st of January next, I promise to pay John Musgrove, senior, eight hundred dollars, for value received. May 10th, 1836.

(Signed,)

N. W. COLLIER.

Test, THOS. HAM.”

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He also proved that Kinchen Musgrove died 30th April, 1845; and introduced an exemplification of an action of trover from Baker Superior Court, returned to March Term, 1842, in favor of Larkin E. Musgrove, administrator, of John Musgrove, against Benj. O. Keaton, for said note, in which there was a verdict on appeal for Keaton at December Term, 1845, and at the same Term, a rule *nisi*, for a new trial granted by the Hon. LOTT WARREN, Judge of said Court, which was called from Term to Term, until Spring Term 1847, and since that time, has not been called, and the record is silent as to the entries on the docket.

The jury found for the plaintiff \$304 65, principal, and \$449 92 interest, with interest from 5th of June, 1856.

Defendant obtained a rule *nisi*, for a new trial, on the following grounds, viz:

- 1st. Because the verdict is contrary to law.
- 2d. Because the verdict is contrary to evidence, and the weight of evidence.
- 3d. Because the verdict is contrary to the charge of the Court, which was "that upon an agreement in writing to pay money as soon as a certain note was collected, the statute of limitations will commence to run as soon as said money is collected or a reasonable time has elapsed for its collection; and after six years from either event the instrument is barred; if the statute began to run before the death of Musgrove, it continued to run afterwards, allowing twelve months for taking out letters of administration.

If the statutory bar was complete at Musgrove's death, it remained so, notwithstanding letters of administration should be afterwards granted. If Keaton collected the money from Collier, upon condition to return it, or retain it upon the event of a certain suit, and that suit is still pending, it is not in fact a collection; if the payment by Collier to Keaton was an absolute payment, the statute runs from that payment, and

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if the statutory period has elapsed since said payment, Keaton is not liable."

The Court refused to make the rule *nisi* absolute, and overruled the motion for a new trial, and defendant excepts.

HINES & HOBBS; and CLARK, for plaintiff in error.

STROZIER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

One of the Judges thinks that the obligation of B. O. Keaton to pay five hundred dollars, became absolute in 1845, when the judgment in trover was rendered in his favor upon the appeal, notwithstanding the motion for new trial; and we all agree that from the fact, that no action was had on the motion for a new trial since 1847, that the jury had a right to infer that the motion was abandoned by Larkin E. Musgrove, the administrator of John Musgrove, and that a settlement took place, or else the case was collusively kept on the docket to prevent the liability of Keaton from attaching, and in either event Keaton would be liable. Indeed, if a reasonable time elapsed, and surely four years after final judgment was long enough, and he failed to bring this litigation to a close, he should be held responsible upon his contract.

The statute of limitations is no bar in this case, because the conditional suit did not terminate till December, 1845, if then; and Kinchen Musgrove died the April before; consequently the statute of limitations did not begin to run until there was an administration upon his estate, which was within four years next preceding the commencement of the present action.

Judgment affirmed.

Swinney vs. Watkins & Ragland.

No. 7.—EBENEZER H. SWINNEY, plaintiff in error, vs. WATKINS & RAGLAND, defendants in error.

- [1.] Remedy by illegality does not lie for any error lying back of the judgment. To reach and rectify a wrong of this sort, a motion must be made to set aside the judgment, or recourse may be had to Equity.
- [2.] When the principal is called at the Term to which his *ca. sa.* bond is made returnable, and answering to his name, presents himself before the Court, the security is entitled to his discharge. It might be very well in all cases, for an exonerator to be entered upon the minutes of the Court.

Debt on *Ca. Sa.* Bond, in Dougherty Superior Court. Decision by Judge POWERS, at December Term, 1856.

James J. Green being arrested by virtue of a *capias ad satisfaciendum*, issued from the Superior Court of Dougherty county, at the suit of Watkins & Ragland, entered into bond, with Ebenezer H. Swinney as his surety, conditioned to "appear at the next Term of said Superior Court, then and there to stand to and abide by such proceedings as may be had by the Court in relation to his taking the benefit of the act entitled "An act for the relief of honest debtors," passed in the year 1823."

The bond was dated 25th January, 1856.

At the Term of the Court to which defendant according to the bond, was to appear, to-wit: at June Term, 1856, when the case was called on the motion docket, Green was in the Court-House, and answered to the case, and as the bill of exceptions states, "surrendered himself up in Court."

Upon motion, judgment was entered against him and Swinney, his surety, for the amount of the debt, and *fi. fa.* issued, which was levied upon a house and lot belonging to Swinney who filed his affidavit of illegality, on the ground that the judgment and *fi. fa.* issued upon the *ca. sa.* bond of Green, when he "did appear and answer to the call, and was in the Court-House in the bar of the Court at the time judgment was entered; wherefore affiant says that judgment and execution are both fraudulent against him."

 Swinney vs. Watkins & Ragland.

The Court held, that the ground taken in the affidavit was insufficient—overruled and dismissed the same, and ordered the *fi. fa.* to proceed; and counsel for Swinney, excepted.

STROZIER & SLAUGHTER, for plaintiffs in error.

LYON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

J. J. Green having been arrested upon a *ca. sa.* at the instance of Watkins & Ragland, gave the usual bond, with E. H. Swinney as security for his appearance at the next Term of the Court, to take the benefit of the insolvent debtors' act. At that time an order was taken to enter up judgment upon the bond, against the principal and his security, upon the ground, that Green had failed to appear. An execution issued, and Swinney the security, arrested the proceeding by affidavit of illegality, in which it is alleged and sworn, that Green when called, did appear, and come within the bar of the Court. The Court at the hearing, dismissed the illegality, and we are of the opinion that the judgment was right.

[1.] According to the general understanding and practice of the Courts, the proceeding by illegality must be for something wrong, either in the issuing of the execution, or for something which transpires subsequently, as for instance payment, which would make it wrong to enforce the *fi. fa.* In other words, it does not reach back behind the judgment and this is attempted to be done in the present case.

[2.] We do not think the security however, to be remediless. He is entitled to his day in Court—an opportunity of being heard, and if the fact be, that Green did appear when called, and was present in Court ready to stand to and abide by the judgment of the Court, the security should be discharged from his obligation. The principal may surrender himself; why was he not ordered into custody? Our opinion further is, that the security may by motion, set aside the

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judgment on this ground. This remedy is neither more nor less, than the writ of error, *coram nobis*, in the English books, and which is in daily use in our Courts.

If there be anything peculiar in the case, recourse might be had to Equity, to make the remedy more effectual. No such resort would seem to be necessary in the present case.

Judgment affirmed.

No. 8.—JOHN DOE, *ex dem*, ISHMAEL DUNN, *et al.* plaintiffs in error, vs. RICHARD ROE, cas. ejector, and ROBERT DYSON, defendant in error.

Service on tenant in possession of land, living out of the county in which the land lies, held good under the circumstances of the case.

Ejectment in Terrell Superior Court. Decision by Judge KIDDOO, Mørch 1857.

This was an action of ejectment. Upon the case being called for trial, defendant moved to dismiss the action upon the grounds:

1st. That at the time of bringing suit defendant was a resident of Randolph county, and not of Lee, where the action was originally brought, and the land situated.

2d. That the Clerk of Lee Superior Court, in which county the land in dispute was situated—(the defendant being a non-resident of said county, although in the adverse possession of the land,) had no authority to issue process directed to the Sheriff of Randolph county, and said Sheriff had no authority to serve the same.

The Court sustained the motion and was about to dismiss the action, when plaintiff moved to perfect service upon

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the defendant, by order of the Court, he being then a citizen of Terrel county, having been cut off from Randolph into Lee county, and then into Terrel, and this cause being transferred to Terrel from Lee Superior Court, the land in dispute being situated in that part of Lee now embraced in Terrel county.

The Court refused the motion and plaintiff excepted.

HAWKINS, for plaintiffs in error.

LYON & IRWIN, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

Trespass in ejectment is an action respecting the title to land, and, by the Constitution, must be tried in the county where the land lies. As the land at the time of bringing suit lay in the county of Lee, the Superior Court of that county alone had jurisdiction of the case. The defendant resided in the county of Randolph. This Court decided, in the case of *Dickinson vs. Allison*, 10. *Ga. Rep.* 558, that the right to issue process and bring the defendant before Court is incident to the jurisdiction. This suit could not have been instituted in the county of the defendant's residence. There can be no doubt but if there had been a tenant in possession of the land, that a service upon him would have been good. In England, the service of the declaration must be personal on the tenant, and on the land, but there are exceptions to this rule there. *Adams on Ejectment* 258 *et seq.*; *old paging* 189. Personal service is not required here. When the premises are vacated and wholly deserted, and the plaintiff's lessor *knew where the tenant lived*, the ancient mode of effecting service in cases where the premises were vacated will not do, and a judgment obtained on such service, would be set aside. *Ib.* 221; *old paging* 157. If the plaintiff's lessor knew where the tenant lived, of course he

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must be served. We see no reason why in a case like that presented in this record, the tenant under the mode of proceeding in ejectment cases in this State, should not have been served as this defendant was. The judgment of the Court below must therefore be reversed.

Judgment reversed.

No. 9.—WILLIAM J. BROWN, *et al.* plaintiffs in error, vs. DAVID B. BURKE, defendant in error.

- [1.] If an exception, be not taken at the trial, it cannot be heard in this Court. A witness testifying against his interest is competent.
- [2.] The purchase of land by a parent in the name of a child, is presumptively an advancement; but that presumption is subject to be rebutted by evidence.
- [3.] With the English statutes adopted here, we have adopted the construction placed upon them by the Courts of England, at the time of their adoption.
- [4.] Under the construction which we give the statute 27th Elizabeth in this State, a subsequent sale, without notice, by a person who had made a settlement, not on valuable consideration, is presumptive evidence of fraud, which throws on those claiming under such settlement, the burden of proving that it was made *bona fide*. 5. *Pal.* 260.
- [5.] In this State Equity causes cannot be tried by the Court, but must be submitted to a special jury. The Court cannot give its opinion upon the facts.

Action for recovery of land, in Baker. Tried before Judge ALLEN, at May Term, 1857.

David B. Burke instituted his action, under the form prescribed by the Act of 1847, against Benj. R. Smith and Samuel J. Smith, for the recovery of lot of land No. 281, in the 8th district of Baker county.

William G. Brown and the Smiths, filed their bill in Equity to enjoin this action. The bill set forth, that said lot of land was purchased by William Burke, the father of the

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plaintiff, from one Seth C. Stevens, in the year 1844, who paid the full consideration money, but that titles to the same were executed by Stevens, to David B. Burke, the plaintiff, an infant son of William Burke. That the conveyance although absolute on its face, was intended for the use and benefit of the father, who went into possession and made improvements, and with his family resided on the place, until the year 1847, when he sold it to one William S. Kea; Kea sold it to his brother Francis D. Kea, in 1848; Francis D. sold in 1850, to William G. Brown, who on the 26th December, 1850, sold the same to the defendants in the action at law, and who are now in possession of the premises.

The bill further alleges that all the foregoing conveyances were *bona fide* and for valuable consideration, and that complainant Brown had no knowledge or notice of David B. Burke's claim or title, when he purchased from Kea.

The answer of David B. Burke, admits the conveyance of the premises from and to the different parties as set forth in the bill; and at the time of the execution of the deed from Stevens, that he, defendant, was a minor, about fifteen years of age. But he avers that he went with his father into possession of the land, and that the same was paid for by his own funds, and not by his father. He further charges that all the purchasers had notice of his title, and that the same was recorded in the proper office, within less than twelve months from the date of its execution, and that said deed passed from his father to Kea, and to all the subsequent purchasers successively. He denies that said land was conveyed by Stevens for the use or benefit of his father; admits the pendency of the action at law, and denies all combination, &c.

The action at law, and the Equity cause were tried together, and submitted to a special jury, on the appeal.

Complainants swore *Seth C. Stevens*, who testified, that *William Burke* contracted with him for the purchase of the land: Gave his notes for the purchase money and took a bond

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for titles, and that he subsequently paid him for the land with his own funds, and took the deed to his son, David B. Burke, then a minor about fifteen years old, saying at the time, that he desired the deed made this way, so that he could not spend it, and that he might have a permanent home for himself and family. William S. Kea, had notice of David B. Burke's title, when he bought.

James George, testified, that the Smiths took possession about the 1st of January, 1851; about seventy-five acres then cleared and in cultivation. William Burke put the first improvement on the lot; built the houses and cleared some thirty or forty acres of land; kept possession of it about three or four years before he sold it; heard him say while in possession, that he had given the lot to his son David, who was a minor, living with his father. William Burke is now dead. Heard Benj. R. Smith say that he had notice of David Burke's title before he purchased the lot.

Francis D. Kea, testified, that he is of opinion that he will not be liable on his warranty deed to Brown, if his title should fail; when he bought the land from his brother William S. Kea, he had heard of David Burke's title to the lot— He sold the land in the summer of 1850, to Brown, and took his note for the purchase money \$1,117; \$600 to be paid on the making of a deed, and the balance on time, and gave his bond for titles. That after this, and before he executed title, he wrote to Brown who resides in Wilkinson county and who was a stranger in the county of Baker, giving him notice of David Burke's title, and proposing to rescind the trade, if he desired it, which letter Brown admitted that he received; that when Brown came down in December, 1850, he again told him of this title, and offered to let him off, but Brown insisted on the performance of the contract, &c.

It was admitted that William Burke paid for the land by a transfer to Stevens, of a negro.

The jury found for the plaintiff, David B. Burke, the premises in dispute and cost of suit.

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Defendants moved for a new trial on the following grounds:

1st. Because the Court erred in admitting the testimony of Francis D. Kea, a witness interested in the event of the suit.

2d. Because the verdict was contrary to law and evidence.

3d. Because the Court erred in charging the jury that defendant's were not entitled to recover, if they had notice of David Burke's title before their respective purchases, and that they were affected with notice if received at any time before the payment of the purchase money, unless they should believe from the evidence, that the deed was made to David B. Burke for the use of his father, and not as an advancement to David, in which event they should find for the defendants.

4th. Because the verdict was contrary to the charge of the Court.

The motion for a new trial was refused on all the grounds therein taken; and defendants excepted.

R. F. LYON, for plaintiffs in error.

JNO. LYON, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The action at law and the bill in chancery to enjoin that action, and to set aside the title on which the plaintiff relied in his action at law, were submitted to the jury together by consent. This consent amounted to a dissolution of this injunction and the jury returned a verdict in favor of the plaintiff in the action at law for the premises in dispute. The defendant moved for a new trial on four grounds as set forth in the statement of the case.

[1.] The first ground is that the Court erred in admitting the testimony of Francis D. Kea, as a witness interested in the event of the suit. I do not find in the record that any objection was made to him as a witness on the trial. But, be that as it may, he conceived himself to be a disinterested

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witness, but if he was mistaken in that, as he probably was, if the proof of notice was necessary at all in the case, he gave evidence against his interest and was therefore competent.

[2.] The second and third grounds in the notice may be considered together, for if the charge of the Court, as complained of in one of these grounds is in accordance with the law, and the jury found against it, the verdict ought not to stand; but if the verdict be consistent with the charge, and the charge is in conformity with the law, it ought to be sustained. If either be contrary to law or the verdict be contrary to evidence, then the new trial ought to be granted. The decision of all these matters, depends, mainly, on the validity of the deed made to David Burke, against subsequent purchasers from William Burke for valuable consideration. The legal title was conveyed to David Burke, hence the question of notice is not very important in the consideration of the questions. The Court, in the latter part of its charge, submitted the correct view of the case to the jury. If the title was made to David in trust for the father, and the father subsequently sold to a purchaser for a valuable consideration, fairly and *bona fide*, then the complainants in the bill of Equity ought to have prevailed, whether they had notice of David's title or not; but if the title was made as an advancement to David, then the verdict should be for the defendant to the bill. The counsel for plaintiff in error lays down the correct general rule, that if a parent purchases land, and takes the title in the name of the child, it is to be presumed as intended for an advancement. And we admit that he is right also in saying that the presumption in favor of an advancement may be rebutted by evidence of clear intention that the child shall take as a trustee. *Rider vs. Kidder*, 10. *Vesey, Jr.* 360; 15. *do.* 43; *Finch vs. Finch*. The rule would perhaps, have been more properly stated in this way, that whenever a man purchases land in the name of another and pays the purchase money, the land will be held by the person to whom the con-

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veyance is made in trust for him who paid the consideration money: and then to have made the purchase by a parent in the name of a child an exception to the rule, for the reason that the law will presume that the purchase was made as an⁶ advancement to the child, and that that presumption may in its turn be rebutted by evidence that it was not so intended. But the authorities sustain the rule and exception, however stated. The evidence relied on in this case, to rebut the presumption that the conveyance to the son was an advancement, is:

First: That the father entered into possession of the land. It is in proof that the son, David Burke, was at that time only fifteen years of age, and was under the dominion of his father, of course. This circumstance is entitled to but little consideration.

Secondly: That at the time of the execution of the deed, William Burke, the father, directed the deed to be made to his son David B. Burke, saying that he desired the deed made that way so that he could not spend it, and that he might have a permanent home for himself and his family. This has much the appearance of a trust, but it was in proof also that he said, while in possession of the land, that he had given it to his son David. This evidence was submitted to the jury. There was no evidence of indebtedness by William Burke at the time, to any one, to show *mala fides*, in the transaction. If it was given in a way that he could not spend it, it must have been given as an advancement, and not as a trust. But again, it was given in that way that he might have a permanent home for his family and himself, but he did not say that the remainder was not for his son. *Finch vs. Finch*, 15. *Vesey Jr.* 51. These things cannot well arise in this case; the deed is positive and absolute on its face, and is presumptively an advancement. There is no declaration of a trust in writing, and this case must be regarded in the same light, as a suit by the father or his personal representatives, against the son, calling for a reconveyance. We do not think that

the presumption that it was an advancement, is sufficiently rebutted by the evidence, to authorize a decree, either for a perpetual injunction or a reconveyance.

[3] It is argued, again, that the deed from Stevens to David B. Burke was a voluntary conveyance so far as David B. Burke was concerned and a subsequent conveyance to a purchaser by William Burke was good against such voluntary title, whether the purchaser had notice or not. This is the correct rule, as established in England at this day, in constructions of the statute of 27th Elizabeth. But we do not consider that the rule was settled in that way at the time of our adopting the statute. That statute makes void all conveyances made for the intent and of purpose to defraud and deceive purchasers, who had purchased or might afterwards purchase, in fee simple &c., and for money, or other good consideration. According to the construction of that statute in England at this day, a purchaser for value, is protected whether he had or had not notice of a prior voluntary conveyance of the land. A treaty for the sale of land after a voluntary conveyance, according to the present construction there, connects itself with the voluntary conveyance and is held to be evidence of a fraudulent intent on the party who made the conveyance. The proposition to sell, is regarded as an effort to transfer for value and obtain money from a stranger for that which was conveyed without consideration. An actual sale is conclusive evidence of the fraud and invalidates the fraudulent conveyance. Whether the purchaser had notice is entirely immaterial. We have adopted the common and statute law of England so far as they were usually in force in the then Province of Georgia on the 14th day of may 1776, so far as they are not contrary to the Constitution, laws, and form of government established in this State. The statutes as they were known to be construed in England, at the time of the act, are what our Legislature is to be presumed to have adopted. What the constructions of the statute of Elizabeth was at that time was pretty fully ex-

amined and discussed in the case of *Cathcart vs. Robinson*, in the Supreme Court of the United States, 5. *Peters* 280. The conclusion to which that Court came, was, that the rule, as it now exists in England, "goes beyond the construction which prevailed at the American revolution, and ought not to be followed."

[4.] The Court proceeds to say that "the universally received doctrine at that day unquestionably went as far as this: A subsequent sale, without notice, by a person who had made a settlement, not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burthen of proving that it was made *bona fide*:" and such must be our construction. We must therefore hold in this case, that if William Burke had held the legal title to the land and conveyed to his son without other consideration than blood, the subsequent sale of the land was not conclusive evidence of fraud.

[5.] It was further urged in the argument, that the bill which brings these matters before the Court, being a proceeding in chancery, ought to have been determined by the Court. In England all Equity causes are decided by the Court. Sometimes the Chancellor sends an issue of fact to a Court of law for trial. In this State, all Equity causes are tried by a special jury, under the direction of the Court as to the law. The Judge here cannot decide a fact, and cannot now give his opinion to the jury as to the preponderance of the evidence.

We think that the jury was warranted in finding as they did, under the charge of the Court, and are therefore of opinion that the judgment of the Court must be affirmed.

Judgment affirmed.

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No. 10.—WILLIAM P. JONES, plaintiff in error, vs. BENJ. B. KEATON, defendant in error.

A new trial granted on the ground that the verdict of the jury is contrary to evidence.

Assumpsit, and motion for new trial, from Baker Superior Court. Tried before Judge ALLEN, at May Term, 1857.

This was an action brought by William P. Jones, against Benjamin B. Keaton, administrator of Joseph J. Montgomery, deceased, for the recovery of \$610 25, for work done for, and cash lent to intestate, &c. as per bill of particulars annexed to the declaration.

Brief of Evidence—For Plaintiff.

James J. Keaton, swore that he gave a note to plaintiff for \$187 50, and he paid said note to William W. Cheever; he could not read, and does not know how the note was payable; it was traded by the intestate, Joseph J. Montgomery to Cheever—the note was given to Jones in a negro trade.

Sam. B. Wright, swore that plaintiff went on the river as a box hand for defendant two or three trips from Newton to Apalachicola, and that he took about fourteen days to make a trip, and a box hand was worth about a dollar per day. That plaintiff worked on a house for defendant, the building of which was worth seventy-five dollars; does not know how long he worked on the house, and there were other parties at work on the house at the time; plaintiff's work on the house was worth a dollar a day.

Newton B. Shult, swore that plaintiff worked for defendant on the river as much as two trips to Apalachicola, and it took on an average eleven days to make the trip, and a hand was worth about \$1 per day. That plaintiff hewed timber for two boxes worth \$10 a piece, and built a house worth seventy-five dollars. It was usual for employers of hands on the river to pay their expenses at Apalachicola;

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Montgomery admitted in his life-time, that he had about \$100 of plaintiff's money in his hands. That Jones made Montgomery a keeper of his money and papers; a sort of guardian. Plaintiff here closed.

For Defendant :

Abraham Carlisle, examined by commission, answers, that he knows the parties; that he had a conversation with plaintiff a short time after Montgomery's death, in which plaintiff said in substance, in reply to an inquiry addressed to him, that he, Montgomery was owing him but very little; he said that he was behind with him for work on his, Montgomery's, dwelling house, twenty-five or thirty-five dollars, and with his, plaintiff's, grocery, but not much; though he did not state the exact amount. Upon enquiry as to Montgomery's indebtedness for work done on the river, he replied that he was not behind with him, plaintiff, anything; it was but little. Joseph Montgomery died between the 5th and 8th of January, 1854; it may be 1853, and now I think, that was the time; and in Newton, Georgia. The conversation with plaintiff was a short time after Montgomery's death; a few days after; and it was at my (witness) house in Newton; witness' wife and children were in the house; no one else was present. I spoke nothing of a settlement, except that Montgomery had settled up with him about all, for work on the river; stated no precise amount due him, only as to the \$25 or \$30 due for work on the house; he said nothing of anything being due him from Montgomery for cash loaned, and for notes and cash deposited with him for safe keeping; nothing as to any other indebtedness than as before stated. Said nothing as to how or when Montgomery paid him. I am friendly with Jones; there is no person present at the taking of these depositions except the commissioners and myself.

Plaintiff in reply, introduced *James Johnson*, who swore, that he was acquainted with the character of Abraham Car-

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lisle while he lived in Newton, and that he had none for truth and veracity; he could not swear that he would believe him on his oath in a Court of justice:

The jury found for the plaintiff four hundred and five dollars.

The defendant moved for a new trial, on the following grounds:

1st. Because, the evidence was not sufficient to authorize the jury to find a verdict for the sum of four hundred and five dollars in favor of the plaintiff.

2d. Because the evidence was not sufficient to authorize the jury to find a verdict for the sum of \$187, the amount alleged by plaintiff as having been collected by defendant's intestate, on a note belonging to plaintiff, and made by James J. Keaton in a negro trade.

3d. Because the evidence was not sufficient to authorize a finding for the plaintiff a greater sum than \$22, for work done on the river by plaintiff.

4th. Because the evidence was not sufficient to authorize a finding for the plaintiff for any amount, unless the plaintiff had successfully discredited the witness Carlisle, whose testimony was introduced by defendant.

5th. Because the witness Carlisle was not discredited by plaintiff.

6th. Because the jury found contrary to evidence, and to the weight of evidence.

The Court granted the motion, and plaintiff by his counsel excepts, and assigns the same as error.

W. E. SMITH, for plaintiff in error.

STROZIER & SLAUGHTER; and McCoy, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The Court granted a new trial on the ground that the verdict of the jury was contrary to evidence. Many of the items in the plaintiff's account are not proven at all. No evidence was submitted as to money loaned. The intestate admitted to one of the witnesses that he had one hundred dollars of plaintiff's money in his hands. He does not specify the time at which he made the statement. If Montgomery received from Cheever the \$187 50-100, it may have been a part of that. We think there is evidence enough to justify the conclusion that the money paid by Keaton on his note to Cheever, went into the hands of the intestate, and that the house was built by plaintiff, and was worth seventy-five dollars.

But the witness, Carlisle, testifies that after the death of Montgomery in a conversation with the plaintiff, he said that Montgomery was owing him but little, that he was behind with him twenty-five or thirty dollars, for work on his house, with his grocery, but not much. There is no discrepancy between the testimony of Carlisle and that of the other witnesses. The plaintiff's witnesses prove some of the items in plaintiff's account, but they say nothing, one way or the other, in regard to payments, and their evidence applies to a time before his death, and the intestate may have been indebted to plaintiff the several amounts testified to by them, and may also have paid them principally before his death.

Carlisle's evidence is perfectly consistent with the proof made by plaintiff's witnesses. He does not deny but that the intestate may have owed the plaintiff every dollar proven by his witnesses, but he says that the plaintiff admitted to him, that at the time of intestate's death he owed him but little. An attempt was made to discredit him; but one witness only was introduced for that purpose and testified in a manner not very satisfactory. He said that he knew his character when he lived in Newton, and that he had none for truth and veracity, and that he could not swear that he

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would believe him on his oath in a Court of justice. But he does not say he would not believe him. This is one witness's oath against another, which is not sufficient of itself. This case must go back for a new trial, and the plaintiff will have time to look up witnesses to impeach, and the defendant witnesses to support his character.

Judgment affirmed.

NO. 11.—WILLIAM J. STRAWN, (bearer,) plaintiff in error, vs ALFRED KERSEY, R. ROUSE, and E. H. WARREN, defendants in error.

If the cause of action comes under the Short Forms Act, it is sufficient to set it out in the language of the statute; and all things else necessary to a recovery, may be supplied by proof.

If the cause of action is defectively set out under the Act of 1847, the declaration may be amended.

Complaint in Lee Superior Court, before Judge ALLEN, April Term, 1857.

This was an action, brought under the form prescribed by Act of 1847, by William J. Strawn, against defendants, on the following instrument, to-wit:

“By the 6th day of April next, we, or either of us, promise to pay to Elbert Pitman, or bearer, four hundred and ninety-seven dollars, if by that time the meeting house for which this note is given, is completed according to the contract signed by said Pitman of the same date of this note. This the 6th day of January, 1855.

(Signed,)

**ALF. KERSEY,
JAMES R. ROUSE,
E. H. WARREN.”**

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After reading in evidence this note, plaintiff's counsel proposed to prove by a witness, John A. Dennard, that the work was not completed by the 6th of April, 1855, for the reason that the Steam Saw-Mill at which the lumber was to be sawed, was blown up, but that the house was finished soon afterwards, and accepted by the parties.

The Court rejected this evidence, and counsel for plaintiff excepted.

Counsel for plaintiff then moved to amend the declaration, by setting forth that after the work was completed, the parties accepted it under the contract, and promised to pay for it. The Court refused to allow the amendment, and plaintiff excepted.

Counsel for defendants then moved for a non-suit, which the Court granted, and plaintiff excepted, and assigns error on all said rulings and decisions.

WILLIAMS & HARPER; and **McCoy & Hawkins**, for plaintiff in error.

WARREN; and **LYON**, for defendants in error.

By the Court.—**Lumpkin**, J. delivering the opinion.

It has been repeatedly held by this Court, that the proper construction of the Short Form Act of 1847, is, that if the cause of action comes under those Forms, it is sufficient to set it out in accordance with those Forms, and that all else may be supplied by proof. In a declaration at common law, the plaintiff would have to aver and prove performance of his contract, or allege, and show a legal excuse for his failure, before he would be entitled to recover. Not so here. It was proposed to be shown, that although the meeting-house, the building of which constituted the consideration for the note sued on, was not completed by the 6th of April, the time stipulated, owing to the blowing up of the Saw-Mill, which was to supply the lumber, still it was finished and

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accepted, soon thereafter, which amounted to a waiver of the time when it was to have been completed. But this testimony, the Court rejected.

Counsel for the plaintiff, then offered to amend his complaint, so as to let in the evidence; and this was refused by the Court.

Under the construction put upon the Act of 1847, the amendment was unnecessary. But even at common law, or certainly under the Act of 1853, respecting amendments, this privilege would have been allowed the plaintiff. And if his complaint was defective without it, it should not have been refused.

Judgment reversed

NC. 12.—RANDAL S. JORDAN, Adm'r, *et al.*, plaintiffs in error,
vs. GREEN B. MAYO, *et al.* defendants in error.

A mere verbal order by a plaintiff to a Justice of the Peace to dismiss certain judgments in his favor, which is not in point of fact done, does not invalidate said judgments, or the executions issuing thereon.

Certiorari, in Lee Superior Court. Decision by Judge ALLEN, at March Term, 1857.

Randal S. Jordan, administrator of Joseph Jordan, deceased, brought suits in a Justice's Court upon several promissory notes, against Green B. Mayo, Alfred King, and Martha Williams. At December Term, 1855, of the Justice's Court, judgments were rendered against defendants in all the cases: they excepted to the decision of the Justice, and executed bond with security, with a view of taking up the cases

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by certiorari, and having the judgments reviewed and set aside.

Afterwards and before the certiorari issued, Jordan ordered the suits to be dismissed ; paid up all the costs, and took the notes upon which the suits were brought into his possession, and commenced suit on the notes, consolidated in the Superior Court : six months after the commencement of suit in the Superior Court, and more than six months after the dismissal in the Justice's Court, plaintiff dismissed his action in the Superior Court, and ordered the Justice of the Peace to issue *fi. fas.* on the judgments rendered in December 1855, none having been issued before, and the same were levied upon the property of defendants, who filed their affidavit of illegality, setting out the foregoing facts. The Justice before whom the illegality was tried, dismissed the same, and ordered the *fi. fas.* to proceed ; to which decision defendants excepted, and by certiorari brought the case up for revision and reversal, before the Superior Court.

The presiding Judge, upon hearing the petition for certiorari and the answer of the Justice thereto, sustained the certiorari, and overruled the judgment of the Justice's Court.

To which decision, counsel for plaintiff in *fi. fa.* excepted, and alleges as error :

1st. Because the Court erred in ruling that the withdrawal of the notes from the Justice of the Peace, the payment of the cost, and the institution of suit in the Superior Court on the same notes, was evidence of a withdrawal of the judgment and dismissal of the suit, and that under these circumstances, it was not competent for the Justice of the Peace to issue the *fi. fas.*

2d. Because the Court erred in ruling that the above facts, amounted to a dismissal of the suits.

STROZIER, for plaintiff in error.

PEARMAN & KIMBROUGH, by McCox, for defendant in error.

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By the Court.—LUMPKIN, J. delivering the opinion.

Did the verbal order of the plaintiff to the Justice of the Peace, to dismiss his *judgments*; (which by the way, was not in point of fact done) blot out his debt or in any way affect the validity of the judgments?

We apprehend a judgment may at the instance, or by the direction of the plaintiff, be discharged by entering satisfaction, or filing a release. It cannot be dismissed. We hold, therefore, the magistrate was right in maintaining the legality of the executions issued upon these judgments; and that the Superior Court was wrong in sustaining the certiorari to his decision.

The defendant however, is not without his remedy in Equity, provided he has a good defence to the original suits, and forbore to make it available, as he had taken the initiatory steps to do, by the conduct of the plaintiff, especially as the suit brought in the Superior Court, upon the consolidated notes, was not dismissed, until it was too late to prosecute his certiorari; the six months allowed by law for that purpose, having already expired.

Judgment reversed.

No. 13.—BENJ. GRIFFIN, and others, plaintiffs in error, vs.
THE JUSTICES OF THE INFERIOR COURT OF BAKER COUNTY,
defendants in error.

Notwithstanding a creditor has obtained an absolute judgment against the administrator of his debtor; still, if it appear that the administrator and the heirs have fraudulently distributed the assets to defeat the collection of the claim, the heirs, and not the securities of the administrator, are primarily liable in Equity for the payment of the money.

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In Equity, from Decatur Superior Court. Decision on demurrer, by Judge ALLEN, at Chambers, May 1857.

The Justices of the Inferior Court of Baker county, filed their bill in Equity against Benjamin M. Griffin and others, setting forth the following facts, viz: That in the year 1834, John Sikes of the county of Baker, became indebted to said county, the sum of \$791 73, for which he gave his note payable one day after date; that in the year 1838, and before the payment of said note, Sikes departed this life, leaving a considerable estate, and a will of which his wife Winney, was appointed executrix. That she died soon afterwards intestate, when Benjamin M. Griffin was appointed administrator with the will annexed, and executed his bond conditioned for the faithful discharge of his duties, with John Montgomery, Green Tinsley, and Mathew R. Moon, as his sureties. This bond bears date the 2d day of December, 1839, and is in the penalty of thirty-five thousand dollars. That John Sikes, the testator, in and by his said last will and testament, bequeathed to his son John Sikes five negroes (naming them,) and all the balance of his estate he gave to his wife, the said Winney, "to be kept together by her and managed by her as her judgment may dictate, and that she shall divide the same equally between herself and her children by me, to be given off to them as they shall marry or come of age." That the said John & Winney left the following children as their legatees and distributees, to-wit: John Sikes, junior, the wife of Benj. M. Griffin, Lucy H. Sikes, Stephen S. Sikes, Rebecca R. Sikes, Richard S. Sikes, and Benj. G. Sikes; the five last named being minors at the death of their father and mother. That John Sikes, junior, has long since departed this life, and his widow afterwards intermarried with — Flournoy, who now resides in the State of Florida; and that he has no property, nor representative of his estate, in Georgia: That Benj. M. Griffin resides in the county of Decatur. That Lucy H. Sikes married — Ashurst, in —: That Stephen S. and

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Richard S. Sikes, have become of age, and one resides in the county of Lee, and the other in the county of Terrell: That Rebecca R. married John Moreland, who resides in the county of Terrell, and was the guardian of Stephen S. and Richard S., during their minority; and is now the guardian of Benjamin G. Sikes, who is still an infant.

The bill further states that suit was instituted against Griffin, as the administrator, with the will annexed, on said note, in 1841, and again in 1844, which were defeated on some technical defect, not involving the merits. That a third suit was again brought in 1848, and after a protracted litigation, judgment recovered in Baker Superior Court at May Term, 1854, for \$791 73 principal, \$1118 92 interest, and \$23 62 cost. That *fi. fa.* issued upon said judgment against the administrator, to be levied upon the goods, &c. of his testator, upon which the Sheriff on the 21st of November, 1856, made a return of *nulla bona*. The bill charges that before said judgment was obtained, all the estate of said John Sikes, senior, the testator, and all the estate of said Winney, were given off and distributed to and amongst their children, above named, or to their guardians, who now have the same—that all said legatees and distributees are solvent, except the said Benj. M. Griffin, the administrator, who is insolvent. That Moon, one of the sureties on his administration bond, has long since been dead, and has in this State neither property nor a representative. That Tinsley, another surety, has removed to the State of Mississippi, leaving but little property here; and that Montgomery, the other surety, is dead and his estate represented by John Lyon of Baker county, but his estate is inadequate to pay said debt. That said judgment is wholly due and unpaid, and that the solvent parties who are in possession of the estate of John Sikes, senior, the original debtor, refuse to pay the same.

The bill prays that a decree may be made, compelling the parties in such order, proportion and under such conditions

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as the Court shall seem proper, to pay and discharge said judgment.

Benj. M. Griffin, Stephen S. Sikes, John Moreland, Richard S. Sikes, and John Lyon, were served or acknowledged service, and demurred to the bill:

1st. For want of equity therein.

2d. Because there has been no recovery against the administrator.

3d. Because the distributees are not proper parties.

4th. Because no recovery or decree can be had in this case, against the legatees and distributees, and complainants have a remedy at law.

5th. Because the bill does not show whether or not Griffin did not return assets sufficient to pay the debt.

6th. Because the bill is multifarious, in that it joins parties who have a common interest.

After argument, the Court overruled the demurrer, and defendants excepted.

STROZIER; and SLAUGHTER, for plaintiffs in error.

LYON; and CLARKE, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Is there equity in the bill? The creditor is unable to collect his debt at law, finding no assets of John Sikes on which to levy. Against whom should he go in equity? It is argued, that having obtained an absolute judgment against Griffin, as administrator, it is conclusive that he had assets with which to discharge this demand; and that if these be wasted, his securities are absolutely liable.

But this position is in the face of the facts, charged in the bill. It is there alleged, that pending the suit against Griffin, he and the heirs fraudulently combining to defeat this claim, distributed the whole of the assets. If this be true the heirs, and not the securities should be primarily liable.

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This proceeding is instituted against the heirs and securities. On the trial, all the facts will come out, and all the parties can be heard; and it will then be easy to determine who ought to pay this money, and the whole litigation will be settled at once. Our conclusion therefore is, that the bill is well brought; that there is an equity in it; and that the remedy in equity is much more complete than at law.

Judgment affirmed.

No. 14.—ROBERT A. CRAWFORD, Adm'r, plaintiff in error,
vs. BUTT L. CATO, defendant in error.

The seizure of property by force, and holding it until the owner executes promissory notes for its release, without the semblance of a consideration, is a species of duress, and a Court of Equity will relieve the maker by preventing their collection.

In Equity in Webster Superior Court. Tried before Judge KIDDOO, April Term, 1857.

This bill was filed by Butt L. Cato, against William Johnston, administrator of John A. Lyon, deceased, to enjoin an action at law, and to have certain notes delivered up and cancelled.

The bill states, that in the year 1849, complainant then a resident of Stewart county, was in possession of a negro man named Henry, whom he had owned for more than seven years, when John A. Lyon of the county of Harris, with three other men, armed, came into the field on complainant's plantation where said negro was at work, and seized and tied him, and was about taking him off. That complainant coming up to where they had said boy confined, Lyon drew his

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knife, and having a stick in his hand, and saying he had a revolving pistol in his pocket, swore he would carry said negro off, if complainant did not pay him or secure to him a debt of six hundred dollars which Lyon alleged that Dr. James W. Cato a brother of complainant owed to him. That complainant owed said Lyon nothing, and never had. That in order to release his negro from Lyon's custody, and to have his services in the crop, and not being able to get out any legal process to prevent said outrage, before said negro could have been removed out of the county, complainant gave to Lyon with his son John W. Cato, as his security, his three notes, each for two hundred dollars. That said notes were without consideration and obtained thus by threats and violence. That said Lyon had since departed this life, and William Johnson his administrator, had commenced suit up on one of the notes, which had become due. The bill prayed for an injunction to restrain the action at law upon said note, and that that and the two others should be delivered up and cancelled.

The answer of the administrator admitted that suit had been commenced upon the note which with two others he found amongst the papers of his intestate. Knows nothing of the consideration of the notes; supposes they are for a good and valuable consideration; knows nothing, nor has he ever heard anything of the circumstances set forth in complainant's bill.

John S. Thomas, testified that on the — day of May, 1847, he was at the plantation of B. L. Cato, in Stewart county; that John A. Lyon, and two other men came there, and Lyon seized a negro man who was at work in the field, and tied him; that soon after Cato came up and asked Lyon what he was doing; he replied with an oath, that he would carry off that negro, if Cato did not pay him \$600. Cato asked him if he owed him any money; Lyon replied that Dr. James W. Cato owed him \$600, and he believed Dr. Cato got the money for him B. L. Cato; and he swore he would take off

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the negro if B. L. Cato did not pay or secure to him the \$600. Lyon had a stick in one hand and a knife in the other, and said he had as good a pistol as ever fired, and he would carry off that negro or die, if Cato did not pay or secure to him the \$600, which Dr. Cato owed him; Cato frequently said to Lyon, "you know I do not owe you a dollar." Lyon would reply: "I believe Dr. Cato got the money for you, &c." That the others who were with Lyon each had a stick; that finally, rather than loose his negro, Cato agreed to give his notes for the \$600, which he did. Lyon and his associates, lived in Harris county, Georgia. Did not hear Lyon claim the negro as his property.

The testimony of the witness, Thomas, was fully sustained by James Cato, a witness, who was ploughing in the field at the time, and that B. L. Cato had had the negro since 1842.

John W. Winston, testified, that he lived with Lyon in 1841, as an overseer; knew the negro boy in dispute; about the time said boy disappeared from the plantation of Lyon, saw whitemen lurking about; next time the boy was heard of, was in possession of complainant in Stewart county. The negro was in possession of Lyon but a short time in 1841.

John J. Kelly, testified, that he knew the parties, and the boy in dispute; knew him in Lyon's possession a short time in 1841; and in 1849: He was called on by Lyon to go with him to Stewart county, for the purpose of getting the boy, who Lyon said, Cato was harboring; went with him, with some other persons, neighbors of Lyon, who were requested to go with them to Cato's, where they found the boy. Went to the field where the boy was: Lyon took the boy and tied him; Cato came up and wanted to know what he meant. Lyon swore he was going to take his negro home, unless Cato would pay him for him. The matter was adjusted by giving the notes, now in controversy; no one was armed as witness knew. Cato drew out his knife and cut the boy

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loose; Lyon then drew his knife; he had a stick and swore he would take the negro off, if Cato did not pay him \$600.

William D. Cobb, a grand juror, on former trial, testified, that Byar then dead, testified, on the former trial, that he was employed by Lyon to bring trover against Cato for said negro, and that he had in his possession a bill of sale to said boy, which was lost or destroyed, that he could not produce it. Lyon was a man of considerable property, and lived in Harris county. Affidavit of administrator was received, laying the foundation for secondary evidence as to the bill of sale, and notice to produce.

Defendant then read in evidence the notes, and the testimony closed.

The presiding Judge charged the jury, that if they believed the notes were given under duress, then they were void, if not then defendant was entitled to recover.

The jury retired and found for the complainant, whereupon, the counsel for defendant moved for a new trial, upon the grounds:

- 1st. That the Court erred in its charge to the jury.
- 2d. That the verdict was contrary to evidence.

The Court refused the motion for a new trial, and defendant excepted.

RAMSAY & KING, for plaintiff in error.

TUCKER & BEALL, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The case stated in the bill, is one of overbearing violence on the part of the plaintiff in error's intestate. He went into the field of defendant (in error,) with three other armed men, and seized a negro man, whom the defendant had owned for more than seven years. He tied him and was about carrying him off, when the defendant came up. The plain-

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tiff drew his knife, and having a stick in his hand, and saying he had a revolving pistol in his pocket, swore he would carry said negro off, if complainant did not pay him or secure to him six hundred dollars, which, he alleged, Dr. James W. Cato, defendant's brother owed to him. The defendant's bill further states that he owed the plaintiff nothing and never had, that in order to release his negro from the custody of the plaintiff and his associates, and to have his work and services on the crop, he was induced to give his three notes with his son John W. Cato as security for two hundred dollars each; that said notes were without consideration and obtained by threats and violence. The administrator's answer states that he knows nothing of the consideration of the notes. There is a conflict in the evidence on a point very material to the issue. The defendant's witnesses testified that intestate seized the negro, and swore he would carry him off, if the defendant did not pay him six hundred dollars that Doctor Cato owed him. The plaintiff's witnesses, or one of them, testified that the intestate claimed the negro, and swore he would carry him off, if the defendant did not pay him for him. If the latter witness gives the true account there was no duress; for the intestate was making a recapitulation of his own property, and after he had seized it, illegally no doubt, because not in fresh pursuit, the parties compromised as stated by that witness.

In this conflict of evidence, the matter was referred to the jury, to determine whether there was duress or not. The charge of the Court to the jury on that point is excepted to. The charge is very brief, and does not explain to the jury, what constitutes duress, and it is insisted that there was no duress even in the aspect of the case, most unfavorable to the plaintiff. According to the defendant's evidence the note was without consideration, for it does not appear that he was, in any manner, liable to the intestate for the money loaned to Dr. Cato.

This case is now in a Court of Equity, which will relieve,

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although the circumstances might not be considered as making out a case of duress in a Court of law. A Court of chancery will look into the matter and ascertain if the notes were executed "freely and voluntarily, or by compulsion; if by fear or terror though not so as to make it, *per duress*," they ought to be set aside. *Atty. Gen. vs. Lothan & Vernon* 497. This case is referred to in *Bacon's Abr. Duress A.*, where it is said, that "in Equity, if a man enters into a bond by compulsion, through the terror and fear, are not sufficient to make it duress at common law, yet it may be relieved against." A threat that an annuity would be withheld from a man in reduced circumstances if he did not execute a deed affirmative of a sale by trustees, has been held to have the effect of placing him in complete and absolute duress. *Oliver et ux, vs. Court et al* 3 *Eng. Exch. Rep.* 312, 336, 337. In the case of *Atlee vs. Backhouse*, 3. *Meeson and Welsbey* 650, Sir James Parke remarks, "If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided." If it be not a *binding* agreement, it may be avoided; and Baron Parke proceeds to discuss that subject, as applicable to the case before him. That was a case of seizure of spirits made by the officers of excise. Upon agreement with the commissioners of excise, the spirits was restored to the plaintiffs, who paid the appraised value to the defendant, who was Receiver General of excise. The suit was brought to recover back the money paid under the agreement, and the Court held it binding, because *both parties considered the seizure legal*, and the consideration was therefore held to be valid. It was remarked then that if they had known it to be an illegal seizure, there might be a question as to the validity of the agreement. The question in such cases is, whether, if the mind of the party had been free to

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act, the agreement would have been executed. The question ought to have been submitted to the jury, whether the giving of the notes by Cato and his son to Lyons, though they were freely executed, was not speaking the mind of Lyons, and not their own. *Peel vs.* — 16. *Vesey* 158 It was insisted that the execution of the notes by the son was valid and good as to him. "The duress of a wife or child would avoid a contract, given under its influence by a parent or child." *Comyn on Cont.* 208. Here, the mind of Lyons was operating through Cato upon his son; for certainly, when he called on his son to become his surety, he did so, because he was constrained to it by the conduct of Lyons. There was certainly, in the language of the Court in the case referred to in *Meeson & Welsbey*, a species of duress in this case, if the witnesses for the defendant are to be believed. There must be the concurrence of two minds to form a contract. If one of the parties wills that another shall execute a deed of conveyance or promissory note, and seizes his property without authority, and refuses to release it until he signs such conveyance or note, there is but a single mind operating in such a case.

The testimony was conflicting, but the preponderance was, we think, with the verdict.

Judgment affirmed.



No. 15.—JOHN DOE, *ex dem.* of WILLIAM W. CHEEVER, plaintiff in error, *vs.* RICHARD ROE *cas. ejector*, and HENRY HORA, tenant in possession, defendant in possession.

By the laws of Georgia an administrator may sell land *by agent*.

Ejectment in Dougherty Superior Court. Tried before Judge ALLEN, May Term, 1857.

The only question in this case, arises upon the rejection by the Court of certain evidence offered by the plaintiff.

It was admitted that defendant was in possession of the premises in dispute, at the commencement of the suit.

Plaintiff offered the grant from the State of Georgia, to Donald McDonald, for the lot in controversy—No. 71, in 1st district of Dougherty county.

It was admitted that McDonald was dead, and that Isaac E. Bower was the administrator of his estate.

Plaintiff then offered a power of attorney from Bower, the administrator to Thomas J. Dunn, and a deed made in pursuance of, and by virtue of said power, by Dunn to Stephen T. Mallory, who was the purchaser of said lot at the administrator's sale.

Defendant's counsel objected to their admission in evidence, on the grounds that the power of attorney, and deed made under it, were void.

The Court sustained the objection, and excluded the evidence; and counsel for plaintiff excepta.

VASON & DAVIS, for plaintiff in error.

STROZIER & SLAUGHTER, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

Can an administrator sell land by agent, in this State?

The general opinion is, that *delegatus non potest delegare*; but this principle applies only to cases in which, the thing to be done by the agent, is that kind of thing, in the doing of which, there is room to the doer, for the exercise of judgment and discretion.

By the common law, there was room to the executor with a power of sale, for the exercise of judgment and discretion in the sale. He might sell at public sale, or at private sale; he

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might elect the place, the day, the hour, of sale. Hence it was, that, by the common law, he could not delegate his power of sale to an agent. *Sug. Pow. Ch. 5; Sec. 1; Wms. Executors, part iii., Book 1, Ch. 1, Stor. Ag. Sec. 13.*

But by our statute, there is no room to an administrator for the exercise of this sort of discretion and judgment in his sales. The statute says, that his sales are to be "at public auction, and on the first Tuesday of the month, between the usual hours of sale, at the place of public sales in the county where such real estate "may lie." The administrator "first giving sixty days notice thereof, in one of the gazettes of this State, and at the door of the Court House, in the county where such sales are to be held." *Cobb's Dig. 323.*

An administrator, in this State, has no more discretion in his sales, than a Sheriff has in his. And a Sheriff has power to appoint deputies for all purposes.

It is the common practice in this State, for administrators to sell by auctioneers, and the validity of such sales has never, I believe, been questioned.

Indeed, it is essential to the performance of his duties, that an administrator should have the power to appoint agents within certain limits. There are cases in which, he must have an overseer or stock-keeper, a custodian of property, a factor, a physician, a lawyer.

Upon the whole, my opinion is, that by the law of this State, an administrator can sell land by agent. Hence I go for reversing the judgment of the Court below.

Judgment reversed

No. 16.—MANNING G. STAMPER, plaintiff in error, vs. MARTHA E. HOOKS, defendant in error.

A written will that is signed by the maker of it, cannot be set up as a *non-jurata* will.

Probate of Will. Appeal from Ordinary, in Lee Superior Court. Decision by Judge ALLEN, March Term, 1857.

In December, 1852, the Ordinary of Lee county, admitted to probate the following paper exhibited as the last will and testament of Robert S. Hook, deceased, late of said county, to-wit:

In the name of God, Amen: I, Robert S. Hooks, knowing the uncertainty of the continuation of life, and the certainty of death; being in a sound and disposing state of mind, do make this my last will and testament.

First: I desire all my just debts paid.

Second: I desire that my three sisters, Margaret E., Louisa, and Lucinda Hooks shall have and possess my entire estate, each possessing an equal distributive share.

Third: It is my desire that my wife Martha E. Hooks, have the sum of ten dollars.

Fourth: It is my will and desire, that my friends, Manning G. Stamper and John T. Sims, be left my sole executors to carry out this my last will and testament. This the 13th October, 1852.

ROBERT S. HOOKS, [L. S.]

This instrument was admitted to record as a will, upon the following testimony or affidavit, viz:

GEORGIA, } Personally came in open Court, Manning
Lee County. } G. Stamper, executor of the last will and tes-
tament of Robert S. Hooks, deceased, and the witnesses of
said will, to-wit: James B. Ridley, John T. Sims (said Sims
having renounced the executorship of said will,) and Mar-

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tha E. Stamper, which witnesses being duly sworn, depose and say, that the said Robert S. Hooks, signed, sealed, declared and published the instrument now propounded as his last will and testament, freely, voluntarily, and of his own accord, without any compulsion or influence whatever, and that at the time of the execution of said will, he the said Robert S. Hooks, was of sound and disposing mind and memory, and that the said will was signed and sealed by said Hooks in the presence of said witness.

(Signed,) JOHN T. SIMS, [L. S.]
 MARTHA E. STAMPER, [L. S.]
 JAMES R. RIDLEY, [L. S.]

Sworn to and subscribed in open Court, Dec'r. 8th, 1852.

WILLIAM NEWSOM, *Ordinary*.

Martha E. Hooks, afterwards, moved a rule in the Court of Ordinary, against Manning G. Stamper, executor of said will, to show cause, why the judgment admitting said will to probate, should not be set aside and rescinded, on the grounds:

1st. Because the paper itself shows that it was not attested as required by law.

2d. Because the affidavit of the witnesses on which the judgment was founded, does not show that they attested and subscribed the paper in the presence of the testator.

At a subsequent Term, the rule was made absolute, the judgment for probate rescinded and the letters testamentary revoked. Stamper appealed, and on the trial, in the Superior Court, his counsel moved to dismiss the whole proceeding, on the ground that the first probate was in solemn form. The Court sustained the motion, and counsel for Mrs. Hooks excepted.

Counsel for Mrs. Hooks then proposed to amend their rule, and to insert as grounds for setting aside the probate:

1st. That the paper propounded is void as a will, under

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the Act of 1852, because there was no witnesses who could have been called to prove it in solemn form.

2d. Because Mrs. Hooks never had notice of the motion for probate in solemn form.

Which amendment the Court refused to allow, and counsel for Mrs. Hooks excepted: And the case coming up before the Supreme Court, upon these exceptions, the decision of the Court below, upon both grounds of exceptions, was reversed; the appeal ordered to be re-instated, and Mrs. Hooks allowed to amend. *See 18 Ga. Rep. p. 471.*

The case coming on again for trial, before Judge ALLEN, at March Term, 1857, counsel for Stamper, the executor, moved to amend, and to show that said will was made by Robert S. Hooks, during his last illness, in his own house, in the presence of the three witnesses, who proved the same before the Ordinary; that at the time of making it, the testator called upon them to take notice and bear witness, that the words then and there spoken, and contained in said writing as exhibited to the Court of Ordinary, contained the disposition he wished made of his property, after his death; that he was at the time conscious of approaching dissolution, and *in extremis*, and died in less than twenty-four hours after the making said will, and that the same was probated and recorded within six months after the death of testator.

And which facts the executor offered to prove by the said three witnesses.

In other words, counsel for the executor proposed to set up and establish the paper as a nuncupative will.

The Court refused to allow the amendment, or proof to be made: and counsel for Stamper excepted.

R. F. LYON; and McCoy, & Hawkins, for plaintiff in error.

STROZIER; and WARREN & WARREN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

If a person *sign* the writing, which he intends to be his will, does the act of signing prevent the will from being a nuncupative will?

We think that it does. A nuncupative will is a will that is not in writing.

Swinburne says: A nuncupative testament is when the testator, without any writing, doth declare his will before a sufficient number of witnesses. 87. *see id.* 77. To the same effect, is the orphan's legacy. *Godolphin*, 13. 6.

Coke says: "*Testamentum est duplex. 1. Inscriptis. 2. Nuncupatum, seu sine scriptis.*"

Now it cannot be said of any deed, or bond, or promissory note, that is *signed* by the maker of it, that it is a deed, or a bond, or a promissory note, as the case may be, *not in writing.* On the contrary, it is to be said of every deed, bond, or promissory note, that is *signed* by the maker of it, that it is a deed, or a bond, or a promissory note, as the case may be, *in writing.*

And it must be true, that whatever may or may not be said of a deed, or a bond, or a promissory note, in this respect, equally may or may not be said of a will, in this respect. It must be true, therefore, that it cannot be said of a will that is *signed* by the maker of it, that it is not a will *in writing.* Consequently, it cannot be said of such a will, that it is a nuncupative will.

This is the conclusion to which we come; it is also that to which the Court below came, for it refused to allow the amendment.

We think, therefore, that its judgment ought to be affirmed.

Judgment affirmed.

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No. 17.—JOHN THOMPSON, plaintiff in error, vs. MARK D. WRIGHT, defendant in error.

No. 18.—MARK D. WRIGHT, plaintiff in error, vs. JOHN THOMPSON, defendant in error.

[1.] If an answer of a witness to interrogatories, understood in one way, will make his answers admissible, understood in another way, will make them inadmissible; and it is doubtful from the answer in which of the two ways it ought to be understood, the question on the answer is one of fact, and therefore, the answer and the other answers should be sent to the jury to be regarded, or disregarded, by them, according to the one of the two ways in which they determine the question.

[2.] To an attachment founded on the ground that the defendant is "actually removing out of the limits" of the county, it is a good defence that the defendant resides in another county.

Attachment and motion for new trial, in Lee Superior Court. Decision by Judge ALLEN, March Term, 1857.

Both parties excepted to the decision of the Court below, and the causes were heard together, in the Supreme Court.

Mark D. Wright sued out an attachment against John Thompson; claiming that Thompson was indebted to him the sum of \$350, for overseeing for him in the year 1847; and as a ground upon which the attachment issued, he swore that Thompson was actually removing out of the limits of Lee county, so that the ordinary process of law could not be served upon him. The attachment issued 10th February, 1848.

The defendant, Thompson, traversed the affidavit and denied that, at the time of the issuing of the attachment, he was a citizen of Lee county, or had been since February, 1847, but averred that he was then and still continued to be a citizen of Early county.

He also pleaded to the declaration:

1st. The general issue.

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2d. A special plea, that plaintiff was employed by, and overseed for him and Robert Thompson as partners, and that he was not indebted to him severally and individually.

3d. That plaintiff neglected and failed to discharge his duty as overseer, whereby defendant was greatly injured, &c.

4th. That he treated the negroes and stock barbarously, whereby defendant was damaged to the amount of \$1,000, &c.

Upon the trial, plaintiff proved that he overseed during the year 1847, on the two plantations, belonging to Robert and John Thompson: That they farmed together that year; hands worked together, but each had separate hands and plantations. That John Thompson moved from the county of Lee to Randolph, in the Spring of 1847, and has not resided there since, but was frequently at his plantation in Lee during the year; sometimes remaining as long as a week or more, superintending and controlling the affairs of the place. From Randolph, defendant moved to Early county; and carried his hands to Early in the first of the year 1848. That his services as overseer on the two places, were worth from \$350 to \$400. John Thompson worked six or eight hands, and Robert worked fifteen or twenty. That Thompson had no wife or children; was land agent and traveled about a great deal in 1847.

Defendant proved that he left Lee county in 1847; went to Randolph with his mother and sister, where he resided for sometime, and then moved to Early, where he at present resides.

The interrogatories taken out by Thompson for Bemis and Castleberry were rejected on the ground that the answers were furnished on hearsay; the part of Bemis's answer relied on to support this ground, was as follows: "Cannot recollect when I visited defendant's house first, but know that defendant came here in the year 1847, because he came here and moved upon his plantation before the party from

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whom he purchased had moved off, and witness was informed of the fact by the party from whom he purchased, and this was about the latter part of November, 1847, or previous to Christmas, for the party from whom defendant purchased, moved off before Christmas, 1847, and that he left defendant in possession.”

The part of Castleberry’s answer relied on to support this ground was as follows: “Knows that defendant’s residence was in Early, from the fact that the occupant of the plantation that defendant purchased informed witness that defendant had purchased the plantation and that he, defendant,” [had moved] “to the residence before the occupant had left. This was the latter part of the year 1847, or before Christmas.”

The jury found a verdict for Wright, the plaintiff; and thereupon Thompson, the defendant, moved for a new trial on the following grounds, viz :

“1st. Because the Court erred in ruling out the answers to interrogatories of William Castleberry and Charles F. Bemis.” (See above.)

“2d. The Court erred in trying the traverse of the defendant and the main issue together.”

“3d. Because the Court erred in charging the jury “that if the plaintiff overseed for Robert Thompson and John Thompson jointly, during the year 1847, then they could not find for plaintiff, unless John Thompson, in making the contract, specially agreed to pay the debt himself;” there being no evidence whatever, that defendant had entered into any such special undertaking; and if there had been, to make it the special debt of one of the parties, it was necessary for the plaintiff in the agreement to have consented to have taken the individual liability of the defendant.”

“4th. Because the finding of the jury was contrary to evidence.”

“5th. Because the finding was contrary to law.”

“6th. Because the finding of the jury was contrary to the

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charge of the Court in this ; “that if the residence of the defendant at the suing out of said attachment was in the county of Randolph or Early, they must find for defendant.” And again, in this ; “that if from the evidence, they were satisfied that the services of plaintiff were rendered for the joint benefit of Robert and John Thompson, they could not find for the plaintiff.”

This motion the Court sustained, and put its judgment according to the bill of exceptions of Wright, on the 4th, 5th, and 6th grounds ; but according to the bill of exceptions of Thompson, on the 4th and 6th grounds only. The grounds on which the Court did not put its judgment, it overruled.

Wright excepted to the judgment granting the new trial, insisting that none of the grounds were good.

Thompson excepted to that judgment, insisting that the overruled grounds were as good as the others.

LYON, for plaintiff in error.

MCCOY & HAWKINS, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

In this case, both parties present themselves as plaintiffs in error. There was no necessity for this. It can never be necessary that the successful party should make out a bill of exceptions, and come to this Court as plaintiff in error. As defendant in error, he can always have the benefit of the grounds which he would put in his bill of exceptions ; and that, although the Court below may set no value on those grounds. The judgment of a Court is right, or wrong, in the opinion of a revising Court, according to *the facts of the case, as they exist* ; not according to the lower Courts estimate of those facts. See *Toombs vs. Pope, and Pope vs. Toombs*, 20. Ga. 763.

In this case the Court below granted a new trial, putting its judgment on some of the grounds contained in the mo-

tion for the new trial, and refusing to put its judgment on the others of those grounds.

The general question for this Court may, therefore, be said to be this; was the Court below right in its estimate of the grounds of the motion?

The first of these, was, that the Court ruled out the answers of Castleberry and those of Bemis, to interrogatories.

The ground on which the Court went in doing this, was, that those answers were founded on *hearsay*; and that this was apparent from the answers themselves.

[1.] We agree, that this ground is good as to the answers of Castleberry; but we think, that it may, or may not, be good, as to the answers of Bemis. We think, that it does not appear, with certainty, from the answers of Bemis, whether those answers were founded on hearsay or not. We think, that those answers leave this question in some doubt, and therefore, we think, that they should have been submitted to the jury, that the jury might determine the question, and according to that determination, regard or disregard the answer. The question was one of *fact*, and as much one for the jury, as it would have been, had the answers been given by the witness under an examination in the presence of the jury.

It is useless to specify the particulars by which, we are led to these opposite conclusions about the answers of these two witnesses.

We think, then, that this first ground of the motion, was good, so far as the ground concerned the answers of Bemis; and was not good, so far as it concerned the answers of Castleberry.

The second ground in the motion, was abandoned in this Court by the counsel for the movant. We think, there was nothing in that ground.

As to the third ground, we merely say, that, in our opinion, there was enough in the evidence, to justify the Court in making the charge complained of in that ground.

As to the fourth, we think it true, that the finding *was* con-

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trary to the evidence, i. e. the finding on the point of *residence*. We think that the evidence proves beyond a doubt, that John Thompson had removed from Lee county, before the attachment was sued out; and, that when it was sued out, he was residing in Early, or perhaps in Randolph; but, certainly, in one, or the other, of those two counties.

As to the fifth: if the verdict was contrary to the evidence on this point of residence, it was contrary to law. But see what may be said on the next ground which is the last.

As to that ground. The complaint in that ground is, that the verdict was contrary to two of the charges of the Court, viz: the charge, that if the residence of Jno. Thompson, the defendant in the action, was at the time of the suing out the attachment, in Early or in Randolph, the jury must find for him; and the charge, that if the jury were satisfied, that the services of Wright, the plaintiff in the action, were rendered for the joint benefit of Robert and John Thompson, they could not find for the plaintiff.

We think it true, that the verdict *was* contrary to the first of these two charges; but we cannot say, that we think it true, that the verdict was contrary to the second of them. The second of them was *hypothetical*; and the hypothesis was *such*, as to leave it optional with the jury to find a verdict for the defendant, according as they might think the fact to be, that the services were rendered for John Thompson alone, or for John Thompson and Robert Thompson, jointly.

If it be true that the verdict was contrary to the first of the two charges, the only question is, was the charge right.

[2.] And we think that it was. The Constitution says, that cases "shall be tried in the county wherein the defendant resides:" and it cannot be, that a case is less a case, because the process in it happens to be extraordinary, rather than ordinary.

Besides the Act of 1810, amendatory of the Act to regulate attachments, says; "and the said defendant or defendants" [in the attachment] "may file his, her, or their defence,

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to the petition or declaration, of the attaching creditor, or creditors, and enter into the same defence, as if the property attached had been replevied." *Cobb's Dig.* 75.

Now when the property attached has been replevied, the attachment becomes dissolved; and the case stands as if it had been founded on ordinary principles. Therefore, when this is so, the case stands subject to any defence that it would have been subject to, if it had been founded on ordinary process. And it is not disputed, that a case founded on ordinary process, stands subject to the defence, that the defendant resides in another county than that in which the case has been brought.

We have thus stated what we think of the estimate put by the Court, on the several grounds contained in the motion for a new trial.

And it appears, that we think that the Court was right in granting the new trial; and also, that we think, that the Court might have put its judgment on another ground, besides the two on which it did put that judgment, viz: the ground, that it ruled out Bemis's interrogatories; but that it was right in not putting its judgment on any of the remaining three grounds.

Judgment, granting new trial, affirmed.

No. 19.—WRIGHT BRADY, plaintiff in error, vs. FURLOW, PRICE & FURLOW, et al., defendants in error.

If a person has a legal title to a fund, for his indemnity, it ought not, whilst that title subsists, to be ordered out of his hands into the hands of a receiver; especially if the fund is in no danger.

Motion to pay over funds to Receiver, in Sumter. Decision by Judge ALLEN, March Term, 1857.

Brady vs. Furlow &c., et al.

William M. Brady, late of Sumter county, departed this life intestate, on the 5th January, 1857, leaving a considerable estate, both real and personal, and against whom there existed debts to a large amount, and of different priorities. On the 8th January, three days after his death, his brother, Wright Brady, applied for and procured letters of temporary administration on his estate, and at the same time made application for general administration. The creditors of William M. Brady, filed their *caveat*, and objected to said administration being granted to Wright Brady, but insisted that the same should be granted to some one of them.

The Ordinary of Sumter county, upon hearing this application and *caveat*, decided against Brady, who appealed. Pending this appeal, and before trial, and there being no probability of a trial, at the March Term 1857, of said Superior Court, Brady petitioned the Judge of said Court, sitting as Chancellor, for leave to sell the perishable property belonging to the estate of the deceased, consisting of wagons, a buggy, hogs, &c., and to hire out some of the negroes. By consent of parties, in lieu of the order to grant leave to Brady, to sell the property and hire out the negroes, Wade J. Barlow was appointed Receiver, and authorized to sell said perishable property.

Afterwards, and at the same Term of the Court, the creditors moved for an order, that Wright Brady should pay over to said Receiver "all the money he has in hand of said William M. Brady, or has had since his death, and that said Receiver invest said money at interest, well secured, to be due the first of January, 1858; said amount to be so turned over, being according to his own showing, twenty-nine hundred and fifty-seven dollars, and sixteen cents."

To this order, Brady objected, and for cause, on oath, showed, that he was the confidential endorser and security of his brother William M. Brady, on various debts, and to secure him from all loss on account of said indorsements and security, he and his brother, before his death, agreed that

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respondent should receive from George O. Dawson, who was largely indebted to intestate, the sum of \$4,750 72, and to apply and appropriate the same to the payment and satisfaction of the debts and demands for which he was liable, as endorser, acceptor, security or otherwise, for his brother. That agreeably to this arrangement he had paid out the sum of \$1,799 57, leaving in his hands \$2,957 16, and that he is liable on various claims and obligations still outstanding and not paid; and claimed that under said agreement he had the right to retain said funds, and that he could not be compelled to pay over the same to the Receiver.

The presiding Judge, holding the showing insufficient, granted the order, and Brady by his counsel excepted.

McCoy & Hawkins; Stubbs & Hill, for plaintiff in error.

Scarborough, represented by Vason, for defendants in error.

By the Court.—Benning, J. delivering the opinion.

By virtue of the agreement between Wright Brady and his brother, Wright Brady acquired the *legal* title to the fund in question, for the purpose of protecting himself against certain liabilities which he was under, for his brother.

At the time when the motion was made to compel him to turn over the fund to the Receiver, a part of these liabilities still subsisted and the total amount of this part, was indefinite; nor was there any attempt made by the movants to ascertain its precise, or even its proximate amount.

The movants did not offer to relieve him from this part.

Such being the facts, the *legal title* to the fund, still remained in him. And if the legal title to the fund was in him, he ought not to have been compelled to yield the *possession* of the fund to a Receiver. Under such circumstances, the rightful executor, if there had been one, could not have recovered the fund from him; and higher rights could

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not have been imparted to a Receiver, than those which such an executor would have had.

If it had appeared, that the fund was sufficient to protect Wright Brady and leave a surplus, it might have been a question, whether it would not be proper, that that surplus should be ordered into the hands of the Receiver; but this does not appear.

We think, therefore, that the Court below erred in ordering the fund into the hands of the Receiver; especially, as there is no evidence, that the fund was in danger.

Judgment reversed.

No. 20.—THOMAS ANSLEY, plaintiff in error, vs. BENJAMIN HARRIS, defendant in error.

A bail-bond payable to the Sheriff, is, in effect, payable to the plaintiff; and, therefore, such bond is good, notwithstanding the Act of 1841, which requires bail-bonds to be taken, payable to the plaintiff.

Scire Facias on Bail-bond, from Sumter. Decision by Judge ALLEN, at March Term, 1857.

Benjamin Harris sued out *scire facias* against John A. Fletcher, and Thomas Ansley, to show cause why judgment should not be entered against them on a bail bond, executed by Fletcher as principal and Ansley as security.

The Sheriff returned *non est* as to Fletcher. Ansley appeared, and showed for cause why judgment should not be rendered against him, that said bond was made payable to the Sheriff, and not to Harris, the plaintiff, and that it had not been assigned.

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The Court held the showing insufficient, and gave judgment against Ansley. To which decision, Ansley by his counsel excepted.

McCoy & HAWKINS, for plaintiff in error.

COOK & MONTFORT, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Is a bail-bond made payable to the Sheriff, a good bail-bond?

The Act of 1841, to define the mode of taking bail, declares that "all bonds taken in cases of bail in this State, shall be taken, payable to the plaintiff in the cause." *Cobb's Dig.* 482.

Is a bail-bond taken payable to the Sheriff, taken payable to the plaintiff in the cause?

It is, according to *Lane vs. Ford, and others*, 8. *Gu.* 323.

That was the case of a *sci. fa.* by the plaintiff against the bail, on a bail-bond, made payable to the Sheriff, and *not assigned* by him to the plaintiff. And the decision was, that the *sci. fa.* was good.

Now, the *sci. fa.* could not have been good, unless the right to sue it out was in the plaintiff; but the right to sue out the *sci. fa.*, could not have been in the plaintiff, unless the right to the bond was in the plaintiff; but the bond was payable to the Sheriff, and had not been assigned by him; therefore, the right to the bond, could not have been in the plaintiff, unless the bond being payable to the Sheriff, was the same thing as if it had been payable to the plaintiff; unless, in other words, the Sheriff, in taking the bond, was but the mere agent of the plaintiff.

The decision, therefore, in effect was, that the Sheriff in taking the bond, was *the agent of the plaintiff*; and that the bond, though, in fact, it was payable to the Sheriff, yet, *in law was payable to the plaintiff*.

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This decision was placed upon our statute, and we do not see why it should be disturbed; especially, as, even by the old law, the whole *beneficial* interest in the bail-bond, was in the plaintiff

See too U. S. vs. Morgan, 3. W. Ct. Rep. 10., U. S. vs. Smith, and others, 3. Hall Am. Law Jour. 458.

We think, therefore, that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

No. 21.—WELCH, SHERMAN & Co., plaintiffs in error, vs. SAMUEL ALLIGOOD, defendant, and ARCHIBALD RICHARDSON, garnishee, defendants in error.

- [1.] An attachment in a Justice's Court may be levied on any debt due to the debtor, even on one exceeding thirty dollars in amount.
- [2.] Issues in Justice's Courts, made up on the return of the garnishee, are to be tried by a jury.

Garnishment in Justice's Court, in Baker Superior Court. Decision by Judge ALLEN, at May Term, 1857.

Welch, Sherman & Co., brought suit in a Justice's Court, against Samuel Alligood, and summons of garnishment under our statute was served upon Archibald Richardson. At the appearance term, the garnishee filed his answer, denying that he was indebted to said Alligood any thing. Plaintiffs traversed his answer, and evidence was offered which showed that there was a matter in controversy between Alligood and Richardson involving the amount of two hundred dollars; and the Justice, after hearing the testimony, gave judg-

ment for the plaintiffs, and did so without the intervention of a jury.

Richardson, the garnishee, excepted to the judgment and applied for a certiorari, to have said judgment reversed by the Superior Court.

Upon the hearing, the Court sustained the certiorari, holding that a Justice of the Peace had no jurisdiction where the amount in controversy exceeded thirty dollars, and ordered the proceedings in the Justice's Court to be dismissed; to which decision, plaintiffs excepted.

SMITH, for plaintiffs in error.

SPICER, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] May attachments in Justice's Courts be levied on debts exceeding thirty dollars, or only, on debts, not exceeding thirty dollars?

They may be levied on debts of any size.

They may be levied on whatever is the "estate" of the debtor, so says the Act of 1811, to amend the "Judiciary Acts," "so far as relates to Justice's Courts." The act uses the word "estate;" and uses it in such a connection, as to make it manifest, that the word was intended to include debts; and debts whatever their size, are debts. *Cobb's Dig.* 660.

The same word, "estate," and in connection with words almost the same, is used in the attachment Act of 1799, relating to the Superior and Inferior Courts. *Id.* 70. And, in that act, the word, beyond question, includes debts of any size.

Attachments in Justice's Courts may be levied on *property*, though the value of it, exceed thirty dollars; as, on a horse worth, say, two hundred dollars. Is there any reason why

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a debt for two hundred dollars should not in like manner be subject to attachments in those Courts?

And then final process from a Justice's Court may be levied on property, real or personal, though that property exceed thirty dollars in value. Why then should it not be so too, as to original process?

It is true, that the same Act of 1811, says, that the Justices of the Peace, "shall have authority and jurisdiction, to hear and determine all suits on any liquidated demand or account, for any sums not exceeding thirty dollars;" but it is equally true, that the act says this, in reference to original suits, not in reference to collateral or ancillary suits like garnishments.

Besides, even in garnishments, where the debt exceeds thirty dollars, the *judgment given*, is never given for more than thirty dollars.

We think, then, that an attachment in a Justice's Court, *may* be levied on a debt, even if the debt happen to amount to more than thirty dollars.

[2.] Is the issue made up on the return of the garnishee, to be tried by a jury? It is. The words of the statute, used in reference to such issue, are, "and the same shall be tried at the next term, by a jury of five persons." *Cobb's Dig.* 660.

The result is, that the judgment of the Court below allowing the certiorari, and dismissing the garnishment, ought to be reversed; and also, that the judgment of the magistrate rendered on the issue, ought to be set aside, and the issue submitted to a jury.

Judgment reversed

No. 22.—JAMES HILL, plaintiff in error, vs BENJ. HUDSPETH, defendant in error.

In an appeal from the Court of Ordinary, the appellant deposited with the Ordinary sufficient money to pay any future costs that might accrue in the case.

Held, That if this appeal was not sufficient as it stood, it was amendable.

Appeal from Ordinary, in Baker Superior Court. Decision by Judge ALLEN, May Term, 1857.

This was an appeal from the Ordinary of Baker county. Upon the case being called for trial, counsel for respondent moved to dismiss the appeal, on the ground that the appellant had not given bond and security as required by law.

It appeared that instead of giving bond and security, the appellant had paid all the cost that had accrued, and deposited with the Ordinary a sum of money sufficient to pay all future cost.

The Court granted the motion and dismissed the appeal; and appellant excepted.

Before the judgment, dismissing the appeal, was entered on the minutes of the Court, counsel for the appellant moved to file in Court a bond with good security, for the cost; the Court refused the motion, and counsel excepted.

STROZIER; and SLAUGHTER, for plaintiff in error.

No counsel appeared for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

It is very doubtful whether the appeal was not sufficient as it stood.

All that the statute requires of the appellant is, to give "security." *Cobb's Dig.* 283. The word used is *security*, not *surety*, and the word, strictly taken, means not a person—a person who becomes bound for another, but a thing, such a

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thing, as a bond, a promissory note, a mortgage, a pawn, a deposit of money.

Sufficient money was deposited in this case to secure the appellee. If, therefore, the word "security," in the statute, is to be taken strictly, this appeal was good.

It must be admitted, however, that the word is used, in many of our statutes, in the sense of the word surety. The word is, perhaps, at this day, broad enough to *include* the word surety. If it is, then an appeal would be in strict compliance with the statute, whether what was taken by the Clerk or Ordinary as surety was a sufficient thing or a sufficient person.

But even if the word is to be treated as having the same meaning as the word "surety," still we think that the appeal was amendable. *Burkhalter vs. Bullock*, 18. *Ga. Rep.* 372; *Hooks vs. Stamper*, *Id.* 472. A part of the ninth section of the Judiciary Act of 1799, is as follows: "And no petition, answer, return, process, or other proceeding in any civil cause, shall be abated, arrested, quashed or reversed, for any defect in matter of form, or for any clerical mistake, or omission, not affecting the real merits of the cause; but the Court, on motion, shall cause the same to be amended without any additional cost, at the first Term, and shall proceed to give judgment according to the right of the cause and matter of law, as it shall appear to the said Court, without regard to such imperfections in matter of form, clerical mistake, or omission." *Cobb's Dig.* 1136.

An appeal is a "proceeding," and is not the Clerk's omission to take a surety a "clerical omission," and one "not affecting the real merits of the cause?"

Judgment reversed.

No. 23.—NELSON TIFT, plaintiff in error, vs. THOMAS H. HARDEN, defendant in error.

A. H. wrote to T. H. H., that he A. H. as agent for a "band," wished to purchase certain musical instruments, and to purchase them as cheaply as possible; and that he requested him, T. H. H., to find out the price of such instruments, and communicate it to him A. H., adding, that T. H. H. might state to persons having such instruments for sale, that he, A. H., had the money in hand, with which to pay for the musical instruments he desired. This writing was in the form of a letter, and was countersigned by one N. T.

T. H. H. bought the instruments himself, and forwarded them to A. H. The latter misapplied the money entrusted to him, to be applied to paying for the instruments, and failed to reimburse T. H. H. In fact, A. H. was insolvent. *Held*, That N. T. was not liable to T. H. H. for the price of the instruments.

Assumpsit, from Dougherty. Tried before Judge POWERS, at December Term, 1857.

This was an action by Thomas H. Harden, of Savannah, against Nelson Tift, brought to recover the sum of \$130, the price of a lot of musical instruments sold to one Archibald A. Hunt.

Plaintiff alleged in his declaration, that said articles had been furnished by him to Hunt, upon the assurance and representation of defendant, that he, Hunt, was trust worthy and entitled to credit, when at the time Hunt was utterly worthless and insolvent, and known so to be by Tift. That Hunt had failed to pay for the goods, and plaintiff was deceived and damaged by the false representations of defendant. Attached to the declaration was a bill of particulars of the articles sold.

Plaintiff read in evidence the following letters from Hunt, to the introduction of which defendant's counsel objected, but which objection the Court overruled, to-wit:

ALBANY, GA., May 22d, 1851.

Thomas H. Harden:

Dear Sir: At the instigation of Col. Tift, of our county, I address you, a few lines, the purport of which is—the

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young men of this place are desirous of forming a band; the purchase of the instruments has been left to me, with instructions to obtain them where they can be bought cheapest. Enclosed you will please find a list of the instruments, the cost of which you will ascertain and inform me forthwith. You can state in your inquiries of those men who have such articles, that the money is in hand.

I am sir, yours most respectfully,

A. A. HUNT.

NELSON TIFT.

ALBANY, GA., June 4th, 1851.

Thomas H. Harden:

Dear Sir: Enclosed you will please find same bill sent you once before, which consider as an order, and forward the instruments.

I will remit you by next mail a draft, drawn in your favor, which you will please pay over to the firm forwarding the instruments. I would have accompanied this letter with the draft, but W. W. Cheever, (of the firm of Sims & Cheever,) the only man from whom I could purchase a draft, is absent. Please state to the gentlemen forwarding the instruments, that they should be sent to the care of Central Railroad agent, Macon, and to Thornburg & Howard, of this place; also, state that the mouth-pieces are desired as small as can be procured.

By attention to the above, you will greatly oblige, yours, most respectfully,

A. A. HUNT.

P. S.—The draft will call as per bill for \$122.

It appeared from the testimony of several witnesses, who were examined, that the musical instruments thus ordered, were purchased by plaintiff from Zogbaun & Co., of Savannah; that he paid for them and sent them as directed, to Albany, where they were received, and used by the young men

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who composed the band, at the head of which was Hunt. That the sum of about \$130 was made up by the young men to buy the instruments, and the money put into Hunt's hands as the agent of the band.

The jury found for the plaintiff the sum of \$176 04, and cost of suit.

Defendant moved for a new trial on the following grounds, to-wit:

1st. Because the Court erred in admitting in evidence the letters from Hunt to plaintiff.

2d. Because the Court refused to charge the jury as requested by defendant's counsel, "that if they believed from the evidence that Tift had given authority to plaintiff to credit Hunt, then plaintiff, before he can recover, must show that he gave defendant notice that he had given credit to Hunt, that he afterwards called on Hunt for payment, which was refused, and that he gave defendant notice thereof in a reasonable time:" but instead thereof, the Court charged the jury that under the law, defendant was not entitled to notice of either of these facts; that if he gave authority to plaintiff to credit Hunt, and upon such authority credit was given to him, and plaintiff thereby sustained loss, that defendant was liable.

3d. Because the verdict was contrary to law, the charge of the Court and the weight of evidence.

The presiding Judge refused the motion for new trial, and defendant excepted.

VASON & DAVIS, for plaintiff in error.

LYON; and CLARKE, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

All that Tift did, was to countersign the first of the two letters written by Hunt to Harden.

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The question therefore, is, whether this act of Tift's made him liable to Harden, for the price of the musical instruments purchased by Harden for Hunt.

What then did this act of Tift's amount to?

It amounted to an assurance by Tift to Harden, that the statements contained in the letter were *true*. It did not amount to an assurance by Tift to Harden, that Hunt was a person fit to be credited for the price of the musical instruments, and to a request by Tift to Harden, that Harden would credit Hunt for that price. Therefore it did not amount to a *guaranty* on the part of Tift—a guaranty of that price. Indeed it was not treated in the declaration as a *guaranty*. Indeed the act did not amount even to so much as an assurance, that Hunt was a person fit to be credited for the price of the musical instruments. Nor was there the least need that it should have amounted to such an assurance: Hunt had the money, with which to pay for the instruments. Hunt did not ask for *credit*: he asked for *information*: he asked Harden to find out the lowest price at which the musical instruments could be purchased, and to communicate that price when found out, to him.

And, perhaps it is equally true, that the act cannot, fairly construed, be made to amount to an assurance, that Hunt was a person that could be depended on to make a faithful application of the money that had been put into his hands to be used in the purchase of musical instruments? Is there any thing in the letter from which Harden would have had the right to infer, that either Hunt or Tift expected, or supposed, that the musical instruments would be sent to Hunt, before Hunt sent the money, with which to pay for them, to Harden, or to the house having them for sale? It can hardly be said that there is, and if there is not, then there is nothing in the letter from which Harden might infer an assurance on the part of Tift, that Hunt was a person who might be depended on to make a faithful application of

the money put into his hands, to be applied in payment for musical instruments.

But even if the act may, fairly construed, be made to amount to such an assurance as this, yet the act can be of no avail to Hardon as the case stands: the declaration does not contain any allegation, that Tift *knew* that Hunt was *not* a man who could be so depended on.

The result is, that this act of Tift's no more amounts to a *deceit*, than it does to a *guaranty*. *Slade vs. Little*, 20. Ga. 371; *Bennet vs. Terrill*, *Id.* 83; *Stanley's Ex'ors vs. Jackson*, 19. Ga.

But unless the act was such that it amounted to a deceit, or to a guaranty, it could not give a right of action to Harden against Tift. And unless it could do this, evidence of it could not be admissible in support of an action by Harden against Tift.

This being so, the Court below erred in admitting the letter; or at least, the verdict was contrary to law and evidence. Therefore, either way, the Court below erred in not granting a new trial.

There ought to be a new trial.

NO. 24.—JOHN DOE, *ex dem.* of JESSE LINSEY, and others, plaintiff in error, *vs.* RICHARD ROE, cas. ejector, and ALEXANDER RAMSEY, tenant in possession, defendant in error.

[1.] In ejectment, if the lessor of the plaintiff has made a warranty of the land to the tenant, or to those under whom the tenant claims, the tenant may use the warranty, not to estop such lessor, but, to "rebut and barre him" of the action.

[2.] The counsel on the plaintiff's side opens his case to the jury, but does not read any law; the counsel for the defendant replies, and during his reply, is handed a decision, as law for the plaintiff, by the counsel for the plaintiff, and he comments on the decision.

Hold, That the counsel for plaintiff, in the conclusion, has also the right to comment on the decision.

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Ejectment, from Sumter. Tried before Judge ALLEN, at March Term, 1857.

This was ejectment brought by John Doe, on the several demises of Jesse Linsey, Josiah H. Carter, Adam Pitner, John R. Cochran and William O. Beall, against Richard Roe, casual ejector, and Alexander Ramsey, tenant in possession, for the recovery of lot of Land No. 161, in the 27th district of originally Lee now Sumter county, and for mesne profits.

Plaintiff offered and read in evidence an original grant from the State to Jesse Linsey, dated 12th December, 1832, proved the *locus* and Ramsey's possession at the commencement of the action, and until the fall of 1855.

Plaintiff further offered to prove, under the count for *mesne profits*, that there was a steam saw mill on the premises, and the value of the trees cut down, sawed up and sold. To the introduction of this testimony, defendant's counsel objected. The Court sustained the objection, and plaintiff's counsel excepted.

Here plaintiff closed.

Defendant, under a notice, drew from plaintiffs a deed made by Jesse Linsey, to Josiah H. Carter, for the premises in dispute, dated 28th December, 1832. Also, a deed from Carter to Adam Pitner, for the same premises, dated 17th January, 1840. These deeds were read as evidence; were in the usual form, and contained the usual covenants of warranty.

Defendant next read in evidence an original deed from Pitner to Benjamin B. Smith, dated 17th July, 1833, for the the premises in dispute, and recorded 12th May, 1835, which contains the following covenant of warranty, viz :

“To have and to hold said tract of land and bargained premises unto him the said Benjamin B. Smith, his heirs and assigns, in fee simple; and I, the said Adam Pitner, will warrant and forever defend the right and title of said land

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unto the said Benj. B. Smith, his heirs and assigns against the claim or claims of all persons whomsoever.”

Defendant then read in evidence, a deed from Smith to Robert J. and Henry K. McCoy, dated 2d July, 1850.

Here defendant rested.

Plaintiff in reply, tendered in evidence and read a copy of a power of attorney from Jesse Linsey to William Hallam, dated 5th October, 1827, as follows, viz:

Know all men by these presents, That I, Jesse Linsey of the county of Habersham, State of Georgia, for divers good causes and considerations, me hereunto moving, do, by these presents, nominate and appoint William Hallam of said county and State, my true and lawful attorney for me, and in my name, to bargain and sell, release, convey and confirm or dispose of in any lawful manner, all that lot or parcel of land known and distinguished by No. 161, in the 27th district of Lee county, which said land I drew in the late Land Lottery: And I do hereby ratify and confirm all and every thing that my said attorney may do, touching the premises, as fully and effectually as if I myself was personally present at the signing and delivery of the same. In witness whereof, I have hereunto set my hand and seal, this fifth day of October, in the year eighteen hundred and twenty-seven.

his

JESSE ✕ LINSEY, L. S
mark.

In presence of

SAMUEL HUGHES,

BENJ'N CLEVELAND, J. I. C.

Endorsed, “I assign this power over to Adam Pitner, in presence of

WILLIAM HALLAM.

Attest—JOHN HOPNER.

This 21st November, 1827.”

Recorded 12th May, 1835.

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Defendant waived all objection to said power of attorney, except its irrelevancy, which objection the Court sustained, and ruled it out.

To which ruling, plaintiff excepted.

The testimony being closed, counsel went to the jury.

Plaintiff's counsel was called on to state the points upon which he relied for a recovery, which he did, but did not read or refer to any authority. Before defendant's counsel concluded, however, plaintiff's counsel handed to him 15th Ga. Reports, and pointed out the case of *Bivin vs. Lessees of Vinzant*, stating that he should rely on that case. Defendant's counsel took the book; read from the case and insisted that that case was distinguishable from the one before the Court.

Plaintiff's counsel in the opening of his argument, proposed to read the case of *Bivins vs. Lessee of Vinzant*, for the better understanding of the decision of the Supreme Court. Defendant's counsel objected, on the ground that he had not read it when stating his points. The Court sustained the objection, and refused to allow plaintiff's counsel to read said decision, remarking that the case had been read before, and the Court was familiar with the points decided: To which ruling and decision, plaintiff excepted.

Plaintiff's counsel then proceeded in his argument to the jury, and remarked that it was unfair for defendant's counsel to read and comment on said decision of the Supreme Court, and then to object and prevent him from doing so.

Counsel for defendant objected to this remark, and moved the Court to stop counsel in such comments; which objection the Court sustained, and arrested plaintiff's counsel in this part of his address; observing that such remarks were personal and improper.

To which remark and ruling, counsel for plaintiff excepted.

The Court charged the jury, that if they believed from the evidence that plaintiff was entitled to recover, the recovery must be on the demise of Pitner; and if they should believe

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that Pitner sold the land in dispute before he acquired title to it, and afterwards acquired title, he, Pitner, could not recover, as such after acquired title enured to the benefit of his prior vendee.

To which charge, plaintiff excepted.

Plaintiff's counsel requested the Court to charge the jury, that if a person without title sells land where he is not in possession, and there is an outstanding paramount title in another, the sale is void under the statute, 32. *Henry 8th*: which charge the Court refused to give, on the ground that the case before the Court did not make this principle of law applicable.

To which refusal, plaintiff excepted.

The jury found for the defendant. Whereupon, counsel for plaintiff tenders his bill of exceptions, and therein assigns as error all the rulings, decisions, charges and refusals to charge, above excepted to.

JAMES J. SCARBOROUGH; and JOHN R. COCHRAN, for plaintiff in error.

McCoy & Hawkins, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

This was an action in the name of Doe, on the several demises of Linsey, Carter, Pitner, Cochran and Beall.

On the trial, the plaintiff showed title in Linsey, (by grant,) and there left the title.

The tenant then showed a deed from Linsey to Carter; a deed from Carter to Pitner; a deed from Pitner to Smith; and a deed from Smith to the two McCoy's. And then the tenant closed his evidence. There was no further or other evidence as to the title.

The deed from Pitner to Smith was made before the deed from Carter to Pitner was made; and consequently, *before Pitner had any title.*

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This being the evidence, any recovery that could have happened in the case, would have had to be a recovery on the demise of Pitner; that is, would have had to be, in effect, a recovery *by Pitner*.

In the deed made by Pitner to Smith, there was a warranty of the land to Smith, "his heirs, and assigns." The tenant, (it may be inferred) claimed under persons who were the "assigns" of Smith, viz: the two McCoys.

The recovery then, if there had been one, would have had to be, not only a recovery *by Pitner*, but a recovery by Pitner, *against persons to whom he had made a warranty of the land*.

Such a recovery followed by eviction, (and we may assume, that a recovery in ejectment will be followed by eviction,) would have been evidence, to show Pitner guilty of a breach of his warranty.

By a breach of his warranty, Pitner would have become liable to those very same persons against whom his recovery was, for the sum of money, with interest on it, which he had obtained, in payment for the land, from their assignor, Smith.

This sum, with the interest on it, would have been equivalent, we are bound to presume, (at least, we are so bound, in the absence of proof to the contrary,) to the value of the land, and the value of all the rents that could have entered into the recovery; for this sum, with such interest, would have been the measure of the damages for the breach of the warranty; and the measure of the damages for the breach of a warranty, nothing can be, except something of a value equal to that of the warranted land and the value of the rents, lost by the warrantee.

By a recovery then, Pitner would have become liable to the two McCoys, the "assigns" of Smith, for a sum precisely equal in value to the value of what, by the recovery, he would have obtained from them.

These things being so, the question is, did the McCoys have the right to retain the land as against Pitner? In other

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words, the question is, did this warranty of Pitner's constitute a defence for the McCoys' against his suit?

And, taking the case as it stood, (it standing without any evidence to show the relation which the value of the land and of the rents on the one hand, bore to the purchase money, and the interest thereon, on the other,) the answer to the question, we think, must be, yes. Such, it seems to us, is the answer which section 446 of Littleton, together with the comment upon it by Coke, requires to be given.

That section is in these words:

“Also these words which are commonly put in such releases, scilicet (quæ quo-vismodo in futurum habere potero,) are as void in law; for no right passeth by a release, but the right which the releasor had at the time of the release made. For if there be father and sonne, and the father be disseized, and the sonne (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warrantie, &c.; and after the father dieth, &c.; the sonne may lawfully enter upon the possession of the disseisor, for that he had no right to the land in his father's life, (pur ceo que il n'avoit droit en la terre en la vie son pier) but the right descended to him after the release made by the death of his father, &c.”

And the comment is in these words: “For if there be a warranty annexed to the release, then the sonne shall be barred. For albeit, the release cannot barre the right for the cause aforesaid, yet the warranty may rebut and barre him and his heirs of a future right, which was not in him at that time: and the reason (which in all cases is to be sought out) wherefore a warrantee being a covenant reall, should barre a future right, is for avoiding of circuitie of action (which is not favored in law); as he that made the warranty should recover the land against the ter-tenant, and he by force of the warrantie to have as much in value against the same person.”

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Lord Coke's expression is, that the warranty may "*rebut and barre him,*" &c., not that the warranty may *estop* him. And this is just what we would be understood as saying in this case. Indeed, to say that the thing, *warranty*, is an estoppel upon the warrantor, is to destroy the thing, as a *warranty*, for every estoppel is mutual; if therefore, the warranty estops the warrantor, it equally estops the warrantee; and if it estops the warrantee, the effect must be, to prevent him from alleging any breach of the warranty; and this is to destroy the warranty.

[1.] We think then, that Pitner's warranty was a good defence to the McCoys against the action—the action being, as the *proof stood*, his action.

This opinion is not adverse to anything in *Bivins vs. The Lessee of Vinzant*, (15. Ga. R. 521.) The present case is not like that case.

That was a case in which Vinzant made two deeds, one, with warranty, before the grant had issued to him, the other after the grant had issued to him. The suit was by a person claiming under the younger deed, against a person claiming under the older deed. It was by a person, therefore, who was *not a party to the warranty*; and consequently by a person who, by recovering, would not subject himself to any action on the warranty. If the suit had been by Vinzant, the *warrantor* himself, the case would have been like this, and Vinzant, by recovering, would have broken his warranty. In this case, so far as appears, Pitner made but one deed; a deed with warranty, but made it before he himself had acquired title; and after he had acquired title, he himself, in the face of his warranty sued his warrantee for the land.

What is said of Bivins and Vinzant, may be equally said of *Way vs Arnold*, 18. Ga. 181.

If, in the present case, the plaintiff had shown a deed from Pitner to *Cochran*, the case would have been more like those two cases, but he did not do that. He did not offer to show title in any of his lessors below Pitner, or, indeed below Lin-

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sey, the title having been carried down into Pitner by the opposite party.

Assuming, then, the correctness of our opinion, that Pitner's warranty was a good defence to the McCoys, against the action in the form in which the proof stood, the question is, whether, of the charge of the Court, so much was right, as consists in these words: "And if they should believe, that Pitner sold the land in dispute before he acquired title to it, and afterwards acquired title, he, Pitner, could not recover on such *after* acquired title, but that such title enured to the benefit of his prior vendee."

These words, we take it, were intended to amount to this; that if Pitner made the deed to Smith, Pitner could not recover, for the reason, that his after acquired title *enured to the benefit of Smith*: if so, we think the proposition they lay down is true, but for a different reason, viz: for the reason, that Pitner's deed to Smith contained *a warranty*.

Whilst then we may say that we approve the Court's proposition, that Pitner's "after acquired title enured to the benefit of his prior vendee," we are not prepared to say, that we approve the reason on which the Court founds the proposition.

This being the view which we take of the charge, it is unnecessary to express any opinion on the rejection of the evidence offered in the Court for *mesne profits*. I have no doubt myself that the evidence was admissible. See *Cunningham vs. Morris*, 19. Ga. R. 583.

Was the rejection of the power of attorney made by Linsey to Hallam, proper?

There were entries on the power of attorney to Hallam to show it one that had been assigned by Hallam to Pitner; and one the recording of which was on the same day on which was recorded the deed from Pitner to Smith.

These are facts suggestive of the existence of the further fact, viz: That Pitner, in making that deed, intended to act, not as principal, but as an agent—as the agent of Linsey;

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and that Smith, in accepting the deed intended to accept it as a deed made by Pitner, not as a principal, but as an agent, as this very agent of Linsey. These facts are such as are *suggestive* of this further fact. But still, they are not sufficient by themselves to *prove* that fact, in the face of this other fact, that the deed itself is in the mere name of Pitner, and takes no notice of the power of attorney; especially, as, in law, the power of attorney, was not assignable.

Therefore, we do not think that the rejection of the power of attorney, even if wrong, is a matter to require us to grant a new trial.

But we do not say that we think that the rejection of the power of attorney *was* wrong. As to that, we express no opinion.

The counsel for the defendant in error commented, before the jury, upon the case handed to him by the counsel for the plaintiff in error. After doing that, it certainly did not lie in his mouth to say, that the counsel for the plaintiff in error should not also comment, before the jury, upon the case.

[2.] We think therefore, that the Court should have allowed the counsel for the plaintiff in error so to comment.

But still, we do not think this an error that entitles the plaintiff to a new trial, because we think that it was not in the power of comment, on that case, to show that the plaintiff was entitled to a verdict.

As to the only remaining point: the Court's stopping the plaintiff's counsel from proceeding in his charges of unfairness made against the defendant's counsel, we cannot say, that we see anything wrong; such charges could have nothing to do with the issue; and therefore any effect at all which they might have had, would, of necessity, have been an improper effect.

Upon the whole, we have to affirm the result of the decisions of the Court below.

Judgment affirmed.

No. 25.—EPPY W. BOND, and JAMES PATILLO, plaintiffs in error, vs. JACOB WATSON, defendant in error.

- [1.] The law requires the utmost fidelity in an administrator. He cannot sell lands privately as his own, and perfect that title by selling it as administrator of his intestate, the land belonging to his intestate's estate. Such sale may be set aside at the instance of any of the *cestui que trusts*.
- [2.] If he make an agent, and that agent become the purchaser of the land for himself or another, the sale may be set aside.
- [3.] A Court of law has no jurisdiction to set aside and order to be cancelled a deed improperly obtained; and when that is necessary to the attainment of justice, the party has no adequate remedy in a Court of law.
- [4.] Injunction will be retained unless the answer of defendant swear off the Equity.

In Equity, in Baker Superior Court. Motion to dissolve injunction, decided by Judge ALLEN, at chambers, April 1857.

The bill alleges that complainant, Jacob Watson, is in possession of lot of land No. 143, in the 9th district of originally Early, now Baker county, which he purchased from one Leonard S. Acre, and that Eppy W. Bond and James Patillo, the defendants, have brought ejectment against him for said lot of land, which is now pending in Baker Superior Court.

That Patillo seeking to get possession of said land and evict complainant therefrom, bought the same from Eppy W. Bond, and in order to perfect title, Bond applied for and obtained letters of administration on the estate of Elizabeth Bond, who died testate about the year 1824, and whose estate has long since been settled; that letters of administration were granted by the Ordinary of Elbert county, although said Elizabeth at the time of her death, resided in the county of Franklin, and the Court of Ordinary of Elbert county, had no jurisdiction. That after said letters were issued to Eppy W. Bond, he had said land sold, and Patillo, under

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their agreement, became the purchaser at a price greatly below its real value, and titles were made to him by said Bond as administrator.

The bill further alleges that in order to protect himself, complainant has purchased the interest of three of the heirs of Elizabeth Bond, in said land, but the legal title of Elizabeth Bond having vested in the purchaser from her administrator, he is unable to defend himself at law against the action of ejectment. That said administration was taken out and said sale made, not to benefit the heirs at law, but solely to carry out the fraudulent purposes of Bond and Patillo to evict complainant from the land, and to benefit themselves.

The bill prays for an injunction of the action at law, until there can be a hearing of the case in Equity, &c.

The Chancellor granted the injunction.

The defendants put in their separate answers, and deny all fraud or fraudulent purposes or combination. But allege that the lot of land in question was drawn by Elizabeth Bond, of the county of Elbert, who gave it to her son Nathan Bond, and for this reason said lot was not mentioned or disposed of in her will. That Gaines Thompson, one of her executors, well knowing that said land had been thus given, executed a deed for the same to Eppy W. Bond, the son of said Nathan, dated the 15th June, 1848. That Eppy W. conveyed the same to Patillo by deed, dated 3d December, 1850; but having doubts as to the legal validity of said conveyances, letters of administration were taken out by said Eppy W. on the estate of Elizabeth Bond, and the land sold at public sale, fairly, to the highest bidder, and Patillo became the purchaser.

Upon the filing of their answers, defendants moved, at chambers, to dissolve the injunction, on the grounds, that there was no Equity in the bill, and that if any, it was fully sworn off by the answers.

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The Chancellor refused to dissolve the injunction, and defendants by their counsel excepted.

LYON & CLARKE, for plaintiffs in error.

WARREN & WARREN, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The case presented in the record is a motion to dissolve the injunction granted by the Chancellor in this cause, on two grounds, to-wit:

1st. Because there is no Equity in the bill.

2d. Because all the Equity in said bill has been sworn off by the answers. This is the transcript of the record. The bill of exceptions, as certified to by the presiding Judge in the Court below, states it to be a motion to dissolve the injunction on the coming in of the answers. No ground is set forth in the bill of exceptions on which the motion was made. The presumption would be, that it was made on the ground alone, that the answers denied the Equity charged in the bill. The errors assigned go beyond the grounds presented, either in the transcript of the record, or the bill of exceptions, and complain that the Court erred in refusing the motion, on three distinct grounds: Because,

1st. There was no Equity in the bill.

2d. The complainants had a complete remedy at common law.

3d. The respondents' answers swear off all the Equity in complainant's bill.

We will allow the plaintiff in error the full benefit of his exceptions, and as fully as if we considered them authorized by his motion to dissolve the injunction.

[1.] In determining the questions here presented, I shall refer to such parts of the bill and answers only, as are necessary to an understanding of the judgment of this Court. The first

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exception must depend upon the bill alone, without reference to what appears in the answers. If there be any Equity in the bill, the first ground of error assigned must be overruled. The record shows that the plaintiff in error purchased the land of Eppy W. Bond and brought ejectment against complainant's tenant. Eppy W. Bond administered on the estate of Elizabeth Bond, the drawer of the land, and joined in the action of ejectment to recover the land, not for the purpose of making distribution amongst the heirs at law of his intestate, but for the purpose of perfecting the title he had already made to James Patillo. Subsequently, and after ejectment brought, he obtained an order from the Court of ordinary of Elbert County to sell the land; the land was sold and purchased by Henry Morgan, who was agent of both Bond, the administrator and vendor, and James Patillo, the purchaser; specie was demanded at said sale, no previous notice having been given, that it would be required, and, in consequence, it sold at a reduced price. The complainant further alleges that he has purchased the interest in said land of three of the heirs at law of Elizabeth Bond, that the land is worth three or four times more than it sold for, but that the administrator intends to settle with him as standing in the stead of these distributees at the price at which it was sold. The law requires the utmost fidelity of persons holding the fiduciary character that Eppy W. Bond does, as set forth in this record. He can make no profit from his trust, he cannot become a purchaser at his own sale and retain the advantage of his purchase except at the will of his *cestui que trust*. He can make no private sale and thus evade the rule which forbids him the right to purchase at his own sale. Such a sale may be set aside at the option of any of the *cestui que trusts*, who have not, by *laches* or otherwise, acquiesced in it.

[2.] Again, if he make an agent to sell, and that agent become the purchaser for himself or another, that sale may be repudiated by the parties in interest. The demand of specie at an administrator's sale—although a constitutional right, to

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be sustained under proper circumstances, and when notice is given beforehand—when it is done, and without prior notice, a thing so unusual—is a proper circumstance to be considered, with others which assail the *bona fides* of the transaction. We think there is Equity in this bill which calls for the answers of the defendants.

As to the point that the complainant has an adequate remedy at law, we might remark, that it is a matter of doubt, whether its discussion should be allowed on a motion to dissolve an injunction, when the bill had not been demurred to on that ground. But regarding it now, in the same manner that we should have considered a demurrer to the bill for the same cause, we must look to the case as presented in the bill, without reference to the action of ejection enjoined.

[3.] Has the complainant, then, an adequate common law remedy according to that case? The administrator sold the land as his own and conveyed title. He subsequently administered and as administrator has again sold the land for a grossly inadequate price, and that sale was made, not to carry out his trust for the benefit of the next of kin of his intestate, but for the purpose of perfecting a title made by himself, he having set up a claim adverse to that of the heirs at law of his intestate, and it is alleged that he intends to settle with the heirs at the low and inadequate price at which it was sold. The purchaser of the land from Bond as his, Bond's, own property, became the purchaser at his sale as administrator, under the circumstances already stated. If the allegations of this bill be true, a Court of law can afford no adequate remedy to the complainant, who has a right to have the sale complained of rescinded, and to have the land resold under circumstances that will open the sale to a fair and equal competition, provided his allegations be supported by his proofs.

[4.] The answers do not deny the Equity charged in the bill. The administrator, in whose name the sale of the land was made, knows nothing about the sale. He was informed

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that the sale could be effected without his presence, and he was not present. He gives the name of no agent who represented him.

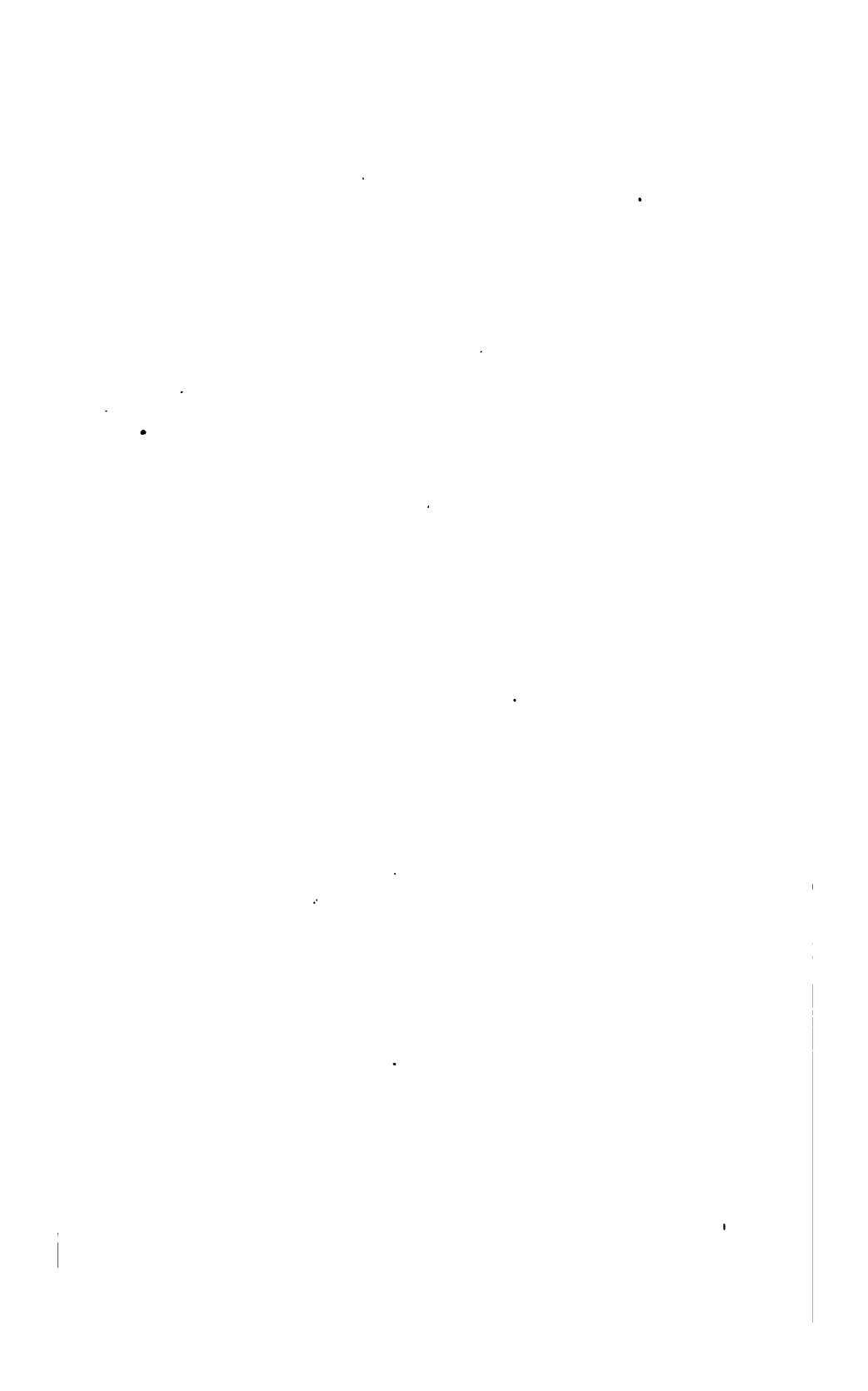
James Patillo, the other defendant and purchaser of the land, answers, that he was not present at the sale, but that Henry Morgan bid off the land for him. But this defendant discloses a fact which fixes a stronger suspicion upon the fairness of the sale than the charges in the bill. He answers that as he was not present at the sale of the land, he does not know that specie was demanded in payment for the land, but supposes it was. He says that he knows nothing of Bond, the administrator, having given instructions to demand specie, and he does not believe he ever did. No one except the administrator had a right to demand specie. If any one else gave the notice, without his authority, it must have been done from some other motive than a desire to promote the interest of the heirs at law of the intestate. One of the defendants answers, that he is informed and believes that the said lot of land brought its full value, perhaps more. The other answers, that he is "*advised*" and believes that the land brought its full value at the time of the sale; neither of them speaks from his knowledge. Without considering further, we are of opinion that the answers are not sufficient to displace the complainant's Equity.

We will remark, however, that while we decide that there is Equity in the complainant's bill, that he has not an adequate common law remedy, and that the answers of defendants do not swear off the Equity of the bill, we, by no means, decide that the complainant is entitled to a perpetual injunction of defendant's action of ejectment, the only relief for which complainant prays. It is true that he may be entitled to that, if the Court and jury should decree, what it is competent for them to decree, that the administrator's sale already made, be set aside, and the deed made in pursuance thereof, be delivered up to be cancelled, and that the land be re-sold by said administrator, after due and legal

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advertisement, and that the complainant deliver possession thereof to the purchaser at said sale, and account to the said administrator for the rents, issues and profits, to be ascertained by the jury in their final decree, provided the proofs submitted to them, authorize such a decree. The case made by the bill and answers calls for a full examination into these things.

Judgment affirmed.



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- Held*, That while it is true that the Act contemplates the exceptions to be overruled by *the Court*, in Term time, and not by the individual members, some month or more after the adjournment; still if the certiorari be granted and a return made thereto by the proper officer, it is evidence upon which the Judge of the Superior Court may act, especially if the petition for certiorari be sworn to by the attorney of the party. *Field vs. Putman* 93

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Held, That the time of the termination of the first suit, was the time when that suit was *dismissed*, and not the time when the Clerk's right to annex a process to the petition expired; and therefore, *held*, that the new suit was commenced in season. *Wynn vs. Booker et al.* 359

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2. The confessions of a defendant not on trial, are not admissible on the trial of a party jointly indicted with him. *Lyon vs. The State*. 399

CONSIDERATION OF CONTRACT.

1. A. agrees with B., that in consideration of the labor and service of certain slaves held and owned by B., he will maintain, or cause, B. to be suitably supported, for and during the term of her natural life, and A. executes and delivers to B. his obligation to that effect. *Held*, that the transfer of A's interest in the slaves to C., is a sufficient consideration for the note given by C. to A. for the purchase of said interest. *Booty, vs. Brazier, adm'r'x.* - - - - - 20

CONSTITUTIONAL LAW.

1. The State is not inhibited by any provision in the Federal Constitution, from passing an act controlling the

management of an incorporated Academy, which is endowed entirely by the State. It may change the mode of electing Trustees and supersede those in office.
Dart et al. vs. Houston et al. - - - 506

See, *Decatur, Town of*—

CONTINUANCE.

See *Practice Superior Court*, 23.

CONTRACTS.

1. A. stipulated with B., that B. should build him a house for \$2,650, payable in five instalments; \$500 when the house should be framed and raised; \$500 when the house should be enclosed and roofed; \$500 when the floors should be laid and the partitions set; \$500 when the ceiling should be put up, and all the carpenter's work done; \$650 when the painting should be done, and the keys delivered.

Held, That by this stipulation, what B. was to do, was but a single job of work to consist in the building of a whole house, for \$2,650, not five separate jobs, to consist in the building of the parts of a house distributed into five certain parts, with a separate price to each part.
Freeman vs. Greenville Masonic Lodge, - - - 184

2. A gin was sold to defendant by a firm of which the plaintiff was a member; a note under seal was given for it. The firm contracted "to furnish the defendant with a forty saw gin, which they warranted to be as good as any gin made, if not, they would furnish one that would." The gin was furnished, but it broke, and was delivered over to a person employed by plaintiff to repair it if necessary; it was repaired. It broke a second time and was delivered to the same employee of plaintiff to be repaired, and was never returned.

Held, That as the gin was delivered to plaintiff's agent to repair, it was the same as a delivery to plaintiff, and notice was not necessary. *Henderson vs. Almond*, 365

3. If a contract is to be construed otherwise than literally expressed, there must be something apparent in the evidence to justify the Court in so interpreting it. *Johnson & Sloan vs. Clarke*, - - - 541

4. Party making a special contract must comply with it. He cannot voluntarily abandon it against the consent of the opposite party, and recover on a common count, ordinarily. *Ibid*.

5. A. H. wrote to T. H. H., that he, A. H. as agent for a "band," wished to purchase certain musical instruments, and to purchase them as cheaply as possible; and that he requested him, T. H. H., to find out the price of such instruments, and communicate it to him, A. H., adding, that T. H. H. might state to persons having such instruments for sale, that he, A. H., had the money in hand, with which to pay for the musical instruments he desired. This writing was in the form of a letter; and was countersigned by one N. T.

T. H. H. bought the instruments himself, and forwarded them to A. H. The latter misapplied the money entrusted to him to be applied to paying for the instruments, and failed to reimburse T. H. H. In fact, A. H. was insolvent. *Held*, That N. T. was not liable to T. H. H. for the price of the instruments. *Tift vs. Harden*, 623

CORPORATIONS—LIABILITY OF STOCKHOLDERS.

1. On the 4th of December, 1841, the Legislature granted a charter to the Dahlonga Tanning and Leather Manufacturing Company, making the stockholders liable, as partners, for the debts of the corporation, and providing a summary remedy for the enforcement of the

same. On the 10th day of the same month, they passed a general law, to facilitate the collection of debts against incorporations and the stockholders thereof.

Held, That the latter Act did not supersede or repeal the former; but was intended to apply to a different class of incorporations. *Force, Brothers & Co. vs. Dahlonga Tanning and Leather Co.* - - - - - 86

2. For a stockholder in a banking or other corporation in this State, who is personally liable, to discharge himself from liability for the notes or other contracts of such bank or other corporation upon a transfer of his stock, it is necessary under the Act of 1838, (*Cobb 112*), that he should give notice once a month for six months, of such transfer, and immediately after the same is made, in two newspapers in or nearest the place where such bank or other corporations shall keep their principal office; and even then, he is not exempt from the claim of a creditor who has given him written notice thereof within six months after the transfer is made. *Ibid.*

3. Where a stockholder of a corporation is made individually liable upon an execution issuing against the corporation, he is entitled to the remedy by illegality, the same as any other defendant in *fi. fa.* *Ibid.*

4. If Trustees of an incorporated Academy are elected under the authority of an Act which does not declare the number to be elected, and the Legislature subsequently recognizes the trustees thus elected as the legal board, it is a ratification of the election. *Dart et al. vs. Houston*, - - - - - 506

5. If a corporate body consist of ten, and a suit is brought by five of the members of the corporation, setting out their names, it is not the suit of the corporation, the charter not authorizing a less number than a majority to sue. *Ibid.*

COSTS.

1. *Next of kin*, not generally liable for cost, on calling executor to prove the will in solemn form, as when the proceeding is not vexatious. *Varner vs. Goldsby*, - 302

CRIMINAL LAW.

1. No irregularity in a criminal case, not affecting the real merits of the offence charged in the indictment, shall be good on a motion in arrest of judgment; all other defects must be taken advantage of by plea, or in some other way, and at the proper time, pending the proceeding. *Teal vs. The State*. - 75
2. On the trial of a defendant for murder, it is the duty of the Court to give to the jury the definition of each grade of homicide, as regulated by the Penal Code, and also of justifiable homicide—provided the testimony will authorize it. If it be apparent, however, that the defendant is guilty of murder or voluntary manslaughter, or is not guilty, it is not error in the Court so to charge. *Ibid.*
3. To justify homicide, the fears of the slayer should be those of a reasonable man—one reasonably courageous, reasonably self-possessed, and not those of a coward. *Ibid.*
4. To support the plea of self-defence in a capital case, the accused must show that he took the life of the deceased to save his own. He must demonstrate that there was a necessity for the killing. *Ibid.*
5. To enforce the payment of a fine, the Court may imprison the defendant, and it is not error to express in the sentence a limit beyond which the imprisonment all not extend, if the fine is not paid. *Brock vs. The*
etc. - 56

6. An indictment for playing and betting at cards ought to state enough to show whether the person with whom the playing and betting was done, was a white person or a negro. *Davis vs. The State.* - - - 101
7. It is not error in the Court to inquire of the prisoner or his counsel, if he will waive the assignment, bill of indictment, and list of witnesses. *Mitchell vs. The State.* - - - - - 211
8. When the Solicitor General is prevented by sickness or other cause, from prosecuting, the Court may appoint some suitable person in his place. *Ibid.*
9. It is no ground for a new trial, if one of the empaneled jurors assist the State in selecting a jury—the Court not noticing the fact, and the juror having disqualified himself from serving, upon his preliminary examination. *Ibid.*
10. If the Court has cause to apprehend that the juror misapprehends the meaning of the statutory questions propounded for the purpose of testing his indifference, the Court may restate them to the juror. *Ibid.*
11. The Court may take down the testimony itself, or appoint another to do it. When the Judge officiates, he should make no comments upon the testimony as taken down; and he should incorporate the whole of it. *Ibid.*
12. It would be better neither for the Court or counsel, to refer to the power of the appellate tribunal, except to cite its authority as made known through its decisions. *Ibid.*
13. In recognizing the right of the jury to judge of the Law, as well as the facts, the Court should not do it

grudgingly, so as to restrict the jury in the full and free exercise of their right. *Ibid.*

14. While it is true at common law, and in certain cases, under the penal code, that one person may kill another for the prevention of a forcible and atrocious crime, still to make such homicide justifiable, there must be an absolute necessity for it; and it must be done in good faith to the public and not in the gratification of revenge, or the execution of a preconceived plan or conspiracy, to take the life of the person killed. *Ibid.*

15. As to reasonable doubts, the rule is simply this—that juries must not give their verdict against the prisoner, without plain and manifest proof of his guilt; which implies that where there is doubt, the consequence should be acquittal of the party on trial; and it is not error, for the Court to read from the books of Reports of this Court its exposition of this doctrine, by way of charge in explanation to the jury. *Ibid.*

16. In charging a jury in a criminal case, it is not proper for the Court to excite their feelings by passionate appeals to their imagination; but it may remind them, that they are intrusted with the administration of public justice on the one hand, and with the life, the liberty, and the honor of the prisoner on the other; and that they should faithfully inquire whether he is guilty of the charge alleged against him in the indictment. *Ibid.*

17. It is no ground to grant a new trial, that the names of the jury were not each separately called, when the verdict was received, provided they were all in the box at the time it was rendered and heard it read; especially when the jury were recalled in a few moments after their discharge, and every one on oath declared

that he heard the verdict read finding the defendant guilty of murder, and that he agreed to it. *Ibid.*

18. A recognizance of bail in a criminal case may be good, although it does not contain a recital that the principal was arrested, that he was examined, that he was "convicted" on that examination, and that an order for bail was made. *Adams vs. The State.* - - 417

19. James Adams assaulted Robert Frank, and cut him with a knife; Adams then entered into a recognizance containing a condition to appear at the next (proper) Court, "to answer such matters as" should "be then and there charged against him by Robert Frank, concerning an assault and battery committed by him, the said James Adams, on the said Robert Frank, and not thence depart without leave of the Court." Afterwards, Frank died of the cutting. An indictment for *murder* was found against Adams. He failed to appear.

Held, That the condition of the recognizance was broken. *Ibid.*

20. In a recognizance of bail in a criminal case, the omission of a statement, that the offence was committed in the State does not, *per se*, render the recognizance void. *Ibid.*

21. The charge of the Court is to be taken in reference to the subject to which it relates. *Ibid.*

22. If at the time a Justice of the Peace admits an assailant to bail, the assailed party is still alive, and the Justice, believing the offence not to amount to more than an assault and battery, admits the offender to bail, the recognizance is not void, although the assailed party may afterwards die of the wounds inflicted by the assailant. *Ibid.*

23. The jury being the judges of the law and the facts, are not bound to go by the charge which the Court makes, as to what is the law, unless the charge truly states what the law is; and whether the charge does that or not, the jury have the right to decide. *McPherson vs. The State.* - - - - 478
24. A threat made by a man when under excitement, is not of as much weight as one made by him when not under excitement; but the difference in the weight of the two threats, is a question for the jury, not for the Court. *Ibid.*
25. If a threat is *equally* susceptible of two constructions, the one in favor of the hypothesis of innocence, is the one that ought to be adopted. *Ibid.*
26. If a man, though intending to commit an unlawful act, abandons his intent to do so, and afterwards by accident kills a man, the killing is not murder; nor is it involuntary manslaughter in the commission of an *unlawful* act. *Ibid.*
27. Notice to A. cannot, in general, operate against B., so as to make B. *a criminal*, unless the notice has come to B's knowledge. *Ibid.*
28. The owner has the right to shoot a person who is a burglar, or a person whom, on sufficient grounds, he believes to be a burglar; and the person seizing the owner's gun to prevent being shot, does not deprive the owner of this right, unless the person surrenders himself. *Ibid.*
29. A motion to quash an indictment, is a demurrer to the indictment, and must be in writing on the arraignment and before plea pleaded. *Thomasson vs. The State.* - - - - 499

30. Bank notes are the subject of larceny from the person. *Ibid.*
31. Money in the hands of a guardian and stolen from him, may be laid in the indictment to be property of the guardian. He has a special property in it. *Ibid.*
32. The jury are judges of law and fact, in this State, and their verdict will not be disturbed as being contrary to law and evidence, unless it appear so palpably as to raise the presumption that their finding was the effect of a mistake or misapprehension of one or the other. *Ibid.*
33. In an indictment for the murder of a slave it is not necessary to aver that the slave was not in a state of insurrection at the time, nor that the death did not happen by accident in giving the slave moderate correction. Such matter must come in as a defence. *Jordan vs. The State.* - - - - 545
34. When a new county is formed from an old one, and before its formation a crime was committed on the territory taken from the old county, the indictment is correct if it charge that the offence was committed in that portion of the old county which was taken to form the new one. *Ibid.*
35. Motion to quash an indictment and motion for a verdict of acquittal because of alleged defects in the indictment are in the nature of a demurrer, which must be filed by way of demurrer on arraignment and before plea pleaded. *Ibid.*
36. Presiding Judge is the trior of the competency of jurors, and his judgment in regard to the competency, will be seldom interfered with. *Ibid.*

37. It is not sufficient to disqualify a person as a juror to prove that he was born without the United States. It must be shown that he has not been naturalized, which may be done by his own oath, or by any competent evidence the party may be able to produce. *Ibid.*
38. It is no ground for a new trial that the panel of the jury put on the prisoner does not number forty-eight, if he does not object at the time the panel is put on him. *Ibid.*
39. On the indictment of a manager or overseer for the murder of a slave, that the owner furnished him with the instrument with which the killing was effected, is no evidence. *Ibid.*
40. That the prisoner struck the father of the girl beaten, to prevent his coming to her aid or relief, when in a dying condition, is admissible as evidence of malice against the girl. *Ibid.*
41. The finding of the accused guilty of manslaughter on an indictment for murder, is an acquittal of the charge of murder, and if the Court be of opinion that the finding was wrong, and ought to have been for murder, it cannot grant a new trial. *Ibid.*
42. The Act of 1799, to carry into effect the 12th section of the 4th article of the Constitution, is not repealed by the penal code of 1833. *Ibid.*
42. If on an indictment for murder the jury find the accused guilty of manslaughter, it is an acquittal as to the charge of murder, and if the Court believe him to be guilty of murder, it cannot grant a new trial. *Ibid.*

See *Confessions* 1. 2.

DAMAGES.

1. A. sells B. a lot of land and gives bond for titles, he having a deed from the drawer, the grant never having issued. The lot reverted, and B granted it under the Act of 1843, by paying \$25. Held, That B. could recover of A. on the breach of his bond only \$25, with interest, and the expenses incurred in obtaining the grant. *Richardson vs. Keerly*, - - - - 68

2. Loss of profits sustained by the suspension of Iron Works in consequence of the failure of a common carrier to deliver coal agreeably to contract, cannot be given in evidence as an item of damages, in an action against the carrier for a failure to transport and deliver under his contract. *Cooper vs. Young*, - - - 269

3. In an action of trespass, for felling and carrying away trees, the damages to be recovered will be at least equal to the value of the trees as they lie felled. *Smith vs. Gonder*, - - - - 353

4. In an action against a public officer for the recovery of damages for breach of duty, it is no error for the Court to charge the jury in the absence of proof of breach of duty, that they could not presume damages had been done the plaintiff. *Craig vs. Adair*, - - 373

DEBTOR AND CREDITOR.

If an insolvent debtor, preferring one creditor to the others; divides the debt which he owes to that creditor, into smaller debts, so that they shall be within the jurisdiction of a Court in which a judgment may be obtained on them that shall be such as to give that creditor an advantage over the others, the debtor does what is not unlawful. *The Bank of Savannah vs. The Planters Bank, et al.*, - - - - 466

DECATUR, TOWN OF,

1. The body of the Act of 3d March, 1856, to amend an Act to incorporate the Town of Decatur, contains nothing that is different from what is expressed in the title. *Hill, relator, vs. Commissioners of Town of Decatur,* - - - - - 203

DEEDS.

1. A deed may be admitted in evidence, even if it be not recorded; but proof of its execution must be made. *Reinhart vs. Miller,* - - - - - 402
2. No ratification of a deed necessary, when the person who signs it, is directed to do so by the party to be bound, at the time it is presented for signature, and it is immediately signed, although the party steps out of the immediate presence of the person directing it. *Ibid.*
3. *All* sealed instruments do not require the attestation of two witnesses. *Ibid.*
4. Attested instruments, may, under circumstances, be proven otherwise than by the subscribing witnesses. *Ibid.*
5. An instrument signed by a stranger is good, if he was directed by the party to execute it, and he immediately does so, although the subscribing witnesses know nothing of the direction so given. *Ibid.*
6. An instrument was substantially as follows: "Know all men by these presents, that I, James B. Carter, for and in consideration of the natural love and affection which I bear unto my children, (naming them) and for their better preferment in life, and the increase of their portion, and also in consideration of the sum of ten

dollars, to me in hand paid by my children at and before the sealing and delivery hereof, the receipt whereof I do hereby acknowledge, have given, granted, bargained, and sold, and by these presents, do give, grant, bargain and sell, unto my children, all the property hereafter named, to be equally divided between them at my death, to-wit: (divers negroes,) to have and to hold all of the property hereby given and granted unto them, their heirs, executors, and administrators, forever, as their own property; also, I do hereby appoint my son-in-law guardian for myself and children, during my natural life: Nevertheless, if any of my children should marry or come of age during my life-time, then they are to draw their equal shares of my estate as heretofore mentioned.

In witness whereof, I have hereunto set my hand and seal, this 12th day of September, 1837.

JAMES B. CARTER, [L. S.]

In presence of

Attest, JAMES S. FULLER,
JOHN R. STANFORD."

Held, That this instrument was not a will. *Watson vs. Watson,* - - - - - 460

7. An instrument was in substance as follows: This indenture made this 1st April, 1845, between Civility Bunn of the one part, and Mathew W. Bunn of the other, witnesseth, that said Civility, in consideration of her love for her son said Mathew, and of five dollars to her in hand paid by him, has given and granted, and does by these presents, give and grant, to said Mathew, all that tract of land lying, &c. one negro Matilda, one negro Edmund, one negro Rhody, and all of her stock, plantation tools, and household and kitchen furniture; and that she reserves to herself her right to said property during her life; and that after her death, said Mathew is to have and to hold the said property, to

him, his heirs and assigns, forever, in fee simple; and that she warrants the property to said Mathew, against herself, and against all other persons whatever.

Held, That this instrument was not a will, but was a deed. *Bunn, adm'r vs. Bunn et al.* 472

8. An instrument was in substance as follows: This indenture, made, &c. between John Taylor, Sr., and Sythia Meek, his daughter, witnesseth, that the said John, for the love which he has for his said daughter, hath given, granted, and conveyed, and does by these presents, give, grant, and convey to the said daughter, and her children, free from all disposition of her present or any future husband, the following property, to-wit: Toby, Piety, and Mariah, negroes, a fourth part of his stock of cattle, one colt, one mare, one filly, one sucking colt; the mare and colt only during his life, after which they are to be divided among all of his children; also two beds, bedsteads and furniture, during his life, after which they are to be divided among all his children; he was to have the use, and control of Piety and Mariah during his life, and at his death, they were to belong to his daughter as aforesaid; to have and to hold said bargained property and its increase to her, and all her children, together with all the right and title thereof, to her, and their own use, benefit, and behoof, forever. In testimony whereof, he thereunto set his hand, and affixed his seal.

his

JOHN X TAYLOR.

mark.

Signed, sealed, and delivered in the presence of

JNO. TAYOR,

JAS. TAYLOR,

NATHANIEL T. HOLTON, J. P.

Held, That the instrument was a deed, and not a will.

Meek vs. Holton. 492

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DURESS.

The seizure of property by force, and holding it until the owner executes promissory notes for its release, without the semblance of a consideration, is a species of duress, and a Court of Equity will relieve the maker by preventing their collection. *Crawford vs. Cato.* - - 594

DYING DECLARATIONS.

See *Evidence* 9.

EJECTMENT.

Service on tenant in possession of land, living out of the county in which the land lies, held good under the circumstances of the case. *Dunn et al. vs. Dyson.* - 572

See *Warranty.*

ENDORSER.

See *Notice to sue.*

ENGLISH STATUTES.

With the English statutes adopted here, we have adopted the construction placed upon them by the Courts of England, at the time of their adoption. *Brown et al. vs. Burke,* - - - - - 579

See *Qui tam actions.*

EQUITY.

1. A Court of Equity will not relieve a person from a judgment which he might have prevented, but for his own negligence. *Rogers vs. Kingsbury,* - - 60

2. In this State Equity causes cannot be tried by the

Court, but must be submitted to a special jury. The Court cannot give its opinion upon the facts. *Brown et al. vs. Burke*, - - - - - 574

3. Notwithstanding a creditor has obtained an absolute judgment against the administrator of his debtor; still, if it appear that the administrator and the heirs have fraudulently distributed the assets to defeat the collection of the claim, the heirs, and not the securities of the administrator, are primarily liable in Equity for the payment of the money. *Griffin et al. vs. The Justices &c.* - - - - - 590

4. A Court of law has no jurisdiction to set aside and order to be cancelled a deed improperly obtained, and when that is necessary to the attainment of justice, the party has no adequate remedy in a Court of law. *Bond and Patillo vs. Watson*, - - - - - 637

See *Duress*.

EQUITY—PLEADING AND PRACTICE.

1. D. gave his notes with sureties in settlement of an account—he afterwards filed a bill to open the settlement. *Held*, That he ought to have joined the *sureties as complainants*, unless they were not willing to be so joined. *Caldwell & Co. vs. Dulin*. - - - - - 4

2. On a settlement between A. & B. the latter gave up certain securities which he had on A. and received from him his notes with securities, for the balance claimed. A. protesting that he was entitled to other credits, which had not been allowed to him, and that he would set up those credits against the notes: Afterwards upon suit on the notes, A. filed a bill to enjoin the suit and open the settlement, in which he failed to make an offer to

return the securities. *Held*, That such offer was not necessary. *Ibid.*

3. The statements of a bill must have such a degree of certainty, that if admitted to be true, some decree could be rendered upon them; or some excuse given for the want of certainty, as that the unstated particulars are exclusively within the knowledge of the defendant. *Ibid.*
 4. Bill to enforce a contract in reference to land, not demurrable, because it does not state whether the contract was or was not in writing. *Piercy et al. vs. Adams et ux.* 109
 5. An answer to a bill from information, hearsay or belief, (except perhaps, when the facts answered by a defendant *against his interest*, are from information, and he states, additionally, that he believes them to be true,) are not responsive to a bill so as to make them evidence in the case. *Arline exo'r vs. Miller.* - - - 330
 6. If the answer to a bill *for mere discovery*, be read to the jury by the defendant against the consent of complainant, and the case goes against the complainant, a new trial ought to be granted. *Mitchell adm'r vs. Lacy,* 345
 7. The answer that neither the administrator nor the guardian has received anything, and they did not believe said distributees had, is not sufficient. *Fletcher adm'r et al vs. Faust et al.* - - - 559
- See *Injunction* 1, 2, 3.

EVIDENCE.

1. Proof that a person is a gambler, is not admissible to impeach his testimony. *Long vs The State,* - - 40
- VOL. XXII. 46.

2. The interest to exclude a witness, must appear affirmatively to be fixed and certain. *Hester vs Coats*, 56
3. Evidence may be admitted in support of a plea substantially good, though defective in form. *Holland vs. Chambers et al.* - - - - - 193
4. In an action of ejectment by heirs at law, proof that the plaintiffs are children "of the late J. B." with the admission by the defendant that one of the children was the owner, in the absence of counter-vailing proof, is sufficient to authorize the jury to find the title in the plaintiffs. *Roberts vs. Foreman et al.* - - - - - 283
5. If upon an examination of the whole evidence, the inconsistencies of witnesses, and the suspicious nature of title papers, the verdict of the jury is such as the whole case warrants, it will not be set aside. *Ibid.*
6. If an instrument offered in evidence is objected to on account of interlineations, what the interlineations were, should appear in the record; but they are not an objection to admitting the instrument in evidence. The jury must decide upon them. *Reinhart vs. Miller.* - 402
7. When a party present, and an instrument is presented for his signature, directs another to sign it, no written authority is necessary, and if the instrument is signed and the parties immediately recognize it by acting upon it, no proof of the presence of the party when the instrument is signed need be made. *Ibid.*
8. Hearsay evidence inadmissible *Ibid.*
9. Dying declarations of belief, are not admissible as evidence. *McPierson vs. The State.* - - - - - 478
10. The sayings of a person, that are against his inter-

est, are good as evidence against him, and those claiming under him by a title created subsequently to the sayings. *Meek vs. Holton.* - - - - 491

11. A witness who has testified in a cause and his evidence is impeached by testimony in contradiction of his statement, may be recalled, and leading questions may be asked him affirmatory of what he has already testified. *Thomason vs. The State.* - - - - 499

12. W. executed to plaintiff in *fi. fa.*, a mortgage upon a house and lot in the city of Columbus, dated 1st of January, 1854. The mortgage *fi. fa.* issued 1st of July, 1856. D. had a deed from the Sheriff of Muscogee county, for the premises, which he bought at a sale made by the Sheriff, under a general judgment, younger than the mortgage, but obtained before the foreclosure of the mortgage, the judgment being dated the 1st of June, 1855. D. offered to prove that G. held a mechanic's lien upon said house and lot for \$2,000, unpaid at the time claimant purchased, and that he had not received any notice from the mortgagee (other than through the registry of the mortgage under the statute,) of the mortgage.

Held, That the testimony tendered was irrelevant to the issue. *Daniel vs. Spalding, Thomas & Vail,* - - - 563

13. A. witness testifying against his interest is competent *Brown et al. vs. Burke,* - - - - 574

EXECUTION.

1. Plaintiff in execution may withdraw it from the Sheriff or the Court, but if he withdraw it when it is entitled to the fund, purchasers *bona fide*, and securities, may have an equity against its enforcement against them. *Byars vs. Bancroft & Co.* - - - - 34

2. When a *fi. fa.* has been issued, it must be returned before the Clerk can issue a *ca. sa.* *Craig vs. Adair*, 373

EXEMPTION LAWS.

Under the exempting Acts, it is only in cases in which the head of the family owns a *greater quantity* of land than that exempted from levy and sale, that any land is required to be laid off with notice to the Sheriff, &c. In cases in which the quantity is less, the whole is exempt: and the Sheriff can sell none of it. *Pinkerton vs. Tumlin et al.* - - - - - 165

FRAUDULENT CONVEYANCES.

1. An instrument of conveyance made to defraud creditors cannot be avoided by the party making it, or his personal representative. *Beall vs. Hall*, - - - 431
2. Under the construction which we give the statute 27th Elizabeth in this State, a subsequent sale, without notice, by a person who had made a settlement, not on valuable consideration, is presumptive evidence of fraud, which throws on those claiming under such settlement, the burden of proving that it was made *bona fide.* 5. *Pet. 280. Brown et al. vs. Burke*, - - - 574

GARNISHMENTS.

1. Garnishees answered that they had the estate of T. N. in their hands, and that the absent debtor was a legatee of T. N., but they could not say whether they had any effects of the absent debtor or not. *Held*, That this answer did not authorize the Court to give judgment against them. *Bridges et al. vs. North et al.* 52
2. Garnishment lies in a suit on a dormant judgment. *Ibid.* .

GRANTS.

1. The drawer of a lot of land died : after his death a grant for the lot issued in his name : after the issuing of the grant letters of administration were taken out on the estate of the drawer, *Held*, That the legal title to the land vested in the administrator, who might maintain ejectment for it. *Beaver vs. Morrison*, - - - 107
2. A deed made by the drawer before the grant issues is not void, but is good to convey all the right which the drawer has. *Witzel vs. Pierce adm'r*, - - - 112

See *Damages* 1.

GUARANTY.

See *Contracts* 5.

GUARDIAN AND WARD.

1. Guardian's receipt to himself is no evidence to support a charge in his own favor against his ward. *Hendry vs. Hurst et ux.* - - - - - 312
2. When the charges are specific in regard to the object, time and amount, evidence may be admitted to prove them. *Ibid.*
3. Attorneys receipts to guardian, stating to be for professional services rendered the ward, are not of themselves, without further proof, sufficient to establish the account against the ward. *Ibid.*

HOMICIDE.

See *Criminal Law*, 2, 3, 4, 14, 26, 33.

HUSBAND AND WIFE.

1. The husband, except through a provision for the wife

in consideration of the marriage, cannot protect his property, by an anti-nuptial contract, against the rule of law which subjects him to the payment of his wife's debts. *Christian vs. Hanks, et al.* - - - 125

2. Where slaves are given by A. in trust for the support and maintenance of his daughter and her children, during the life time of the daughter, and at her death, the negroes and their increase to be equally divided between the children of the daughter; and upon the death of the trustee, the property is taken possession of by the daughter, who permits each of her children as they marry or come of age, to take away one, two, or three of said slaves.

Held, 1. That a receipt by the husband of one of the girls, for three negroes, specifying, that they were received as his and his wife's share of the donor's estate, was not such a reduction to possession of his wife's share of the negroes, as to defeat her equity to a settlement out of the property thus given by her grand father. *Corley vs. Corley et al.* - - - 178

2. That as the husband, or his creditors, or the purchasers of his interest in and to this property, would have to go into equity to effect a distribution of the property, a Court of Equity would interfere and restrain, by injunction, the proceedings, until a suitable provision was made for the wife and children. *Ibid.*

ILLEGALITY.

Remedy by illegality does not lie for any error lying back of the judgment. To reach and rectify a wrong of this sort, a motion must be made to set aside the judgment, or recourse may be had to equity. *Swinney vs. Watkins & Ragland*, - - - - 570

See *Corporations* 3

ILLEGAL CONTRACTS.

1. A note given for professional services rendered by an attorney, on an application for a pardon to the Legislature, in explaining legal principles to the members, and in explaining testimony and arguing its legal effects in such language as one gentleman would use to another in discussing the merits of a subject, is not illegal, because contrary to public policy. *Meadow vs. Bird.* 246
2. A note, illegal in the hands of the payee, because contrary to public policy, is not, therefore, void in the hands of a *bona fide* holder, being transferred before due, and for a valuable consideration ; neither is it void in the hands of a holder as *collateral security for an existing debt*, provided it be transferred before due, and for a valuable consideration, and without notice of the taint in the consideration. (McDONALD, *dissenting.*) *Ibid.*

See *Limitation of Actions*, 4.

INDICTMENT.

See *Criminal Law*, 1, 6, 29, 33, 34, 35.

INJUNCTION.

1. An injunction of a suit on a note, was asked for on an allegation, that a certain credit had not been entered on the note. The credit, if it had been entered, would not have satisfied the note ; but a portion of the note would have still remained due. No tender of this portion was stated.

The allegations as to the necessity of a discovery, were

so uncertain as not to make it clear, that a discovery was needed to prove the defence at law.

Held, That the injunction was properly refused. *Powell et al. vs. Chamberlain, Miller & Co.* - - 123

2. Where a judgment is confessed upon a note, barred upon its face by the statute of limitations, (which has been properly pleaded) by one who is not the attorney of the defendant—the counsel of the party being absent from Court, and the party himself unable to attend on account of both mental and bodily affliction, and there is manifest equity in the defence set up to the debt—Chancery will enjoin the proceeding at law until a hearing can be had; and if the equity in the bill be sustained by the proof, order the judgment at law to be satisfied, or decree a perpetual injunction against the *scire facias* to enforce it. *Cheek vs. Taylor et al.* - 127

3. A denial of the insolvency of a firm on whose insolvency the equity of a cause, in some measure, depends, when made on knowledge, information and belief, with a positive averment of its solvency, is not sufficient to authorize the dissolution of an injunction granted by the Chancellor. *Powell exor vs. Brown.* - 275

4. An executor who answers mainly on knowledge, information and belief, and whose representative character, generally, shows that he can have no positive knowledge, cannot displace the equity of a bill so as to entitle him to a dissolution of the injunction, without proof to sustain his belief. *Ibid.*

5. To open a road which has ceased to be a public road, and to remove fences, &c., are trespasses, for the prevention of which, an injunction will not lie, there being an adequate remedy at law. *Nichols vs. Sutton et al.* - - - - - 369

6. Injunction will be retained unless the answers of defendant swear off the Equiry. *Bond et al. vs. Watson.* 637

INSOLVENT DEBTORS.

1. Judgment of the Inferior Court, discharging an imprisoned debtor, is void if the Court have not jurisdiction of the case; and it is no error for the Court to commit the discharged debtor to jail, if he appear at Court not prepared to comply with the terms of his bond. *McKenzie, Cadow & Co. vs. Hargrove & Co.* - 119

INTERROGATORIES.

1. If evidence be taken by commission, the case in which it is taken need not be stated in the caption to the answers, if it be stated in the heading of the interrogatories, and is set forth in the commission, and all attached together, are enveloped and sent by mail. *Johnson & Sloan vs. Clarke.* - - - - 441

JAIL FEES.

The 2d section of the Act of 1845, provides that "when any debtor is surrendered by his security, it shall not be lawful for any Court to discharge such debtor from custody, because the jail fees are not paid or secured, unless the Sheriff or jailer shall give at least ten days prior notice in writing to the plaintiff or his attorney, who shall be allowed that time within which to pay or give security for the jail fees."

Held, That notice in such case is indispensable; and in the opinion of a majority of the Court, Judge McDonald *dubitante*, a judgment of discharge without it, is void, and may be treated as such in any Court; and the Court are unanimously of the opinion that it does not protect the debtor thus discharged from a re-arrest.

- Is any one but the jailer or Sheriff, entitled to the benefit of this proceeding? quere. *Field vs. Putman.* 93
2. The pay allowed the jailer for keeping a prisoner, is 46½ cents per day. *Ibid.*

JUDGMENTS.

1. A. had a mortgage on property of B. The mortgage was foreclosed, and the *fi. fa.* levied on the property. C. and others had general judgments against B., younger than the mortgage. The property was sold under these general judgments, before it was levied on under the mortgage *fi. fa.*, and D. became the purchaser. D. put in a claim against the levy made under the mortgage *fi. fa.* and sought on the trial to attack the mortgage.
- Held,* That the judgment of foreclosure of the mortgage, did not bar him from such attack. *Johnston vs. Crawley.* - - - - - 348
2. After an acquiescence of more than twelve years in a judgment and its payment, it is too late to move to vacate, where there is no fraud. *Gunn vs. Howell garnishee.* - - - - - 377
3. A mere verbal order by a plaintiff to a Justice of the Peace to dismiss certain judgments in his favor, which is not in point of fact done, does not invalidate said judgments, or the executions issuing thereon. *Jordan adm'r. et al. vs. Mayo et al.* - - - - - 588

JURISDICTION.

1. Where relief is sought in Equity, in defence of an action at law, the Superior Court of the County has no jurisdiction of the case, if the defendant, or if more defendants than one, one of them, does not reside in the county. *Smith adm'r vs. Iverson and wife.* - 191

JUSTICE'S COURTS.

1. New trial granted in Justice's Court when the verdict is not sustained by the evidence. *Sanders vs. White*, 103
2. An attachment in a Justice's Court may be levied on any debt due to the debtor, even on one exceeding thirty dollars in amount. *Welch, Sherman & Co. vs. Alligood, et al.* - - - - - 618

Issues in Justice's Courts, made up on the return of the garnishee, are to be tried by a jury. *Ibid.*

See *Judgments* 3.

LEGACY—VESTED.

1. The fourth item of a will contains the following words: "I desire that the balance of my property shall remain together until my youngest child comes of age, each to be clothed and educated out of my estate, equal with my other children, and my estate to pay them one thousand dollars as they come of age; and when my youngest child comes of age, I wish an equal division of the balance of my property," &c. One of his daughters died before she arrived at the age of twenty-one years, and the bill is filed by her administrator, claiming the legacy. The bill was demurred to, on the ground, that the legacy did not vest in the intestate. *Held*, That the legacy vested on the death of the testator. *Everett et al. exo'r vs. Mount, adm'r.* - 323

LICENSE TO RETAIL.

1. The 12th section of the Act 3d March, 1856, amending the charter of the Town of Decatur, does not confer on the Commissioners of that Town, the power to *prohibit absolutely* the sale of liquor. *Hill, relator, vs. The Commissioners of the Town of Decatur,* - 203

LIMITATION OF ACTIONS.

1. When a part of a lot of land is conveyed by the number of acres, and not by metes and bounds, and the line separating it from the balance of the lot is to be run, the statute of limitations does not begin to run until the division is made, unless there had been undisturbed possession for so great a length of time as to create a legal presumption that there had been a division. *Doe ex dem. Hindsman vs. Roe, and Worthen, casual ejector,* - - - - - 47
2. A Sheriff's deed and possession under it, unaccompanied with the judgment or execution, is good color of title, as a starting point for the statute of limitations. *Hester vs. Coats,* - - - - - 56
3. A Sheriff's deed, though good as color of title, unaccompanied with a judgment or execution, still possession under it cannot be connected with any previous possession, so as to constitute a good statutory bar. *Ibid.*
4. For money paid on an illegal contract, without fraud, an action lies immediately to recover it back, and is barred in four years. *Hunt vs. Burke.* - - - 129
5. When the right of action does not accrue in regard to the wife's right until after coverture, it is not error for the Court to charge the jury, that if the complainant was a minor and married when she was a minor, she is protected from the bar of the statute, if she sue within three years, &c. *Arline Ex'or vs. Miller,* - 330
6. Since the Act of 20th February, 1854, (See Acts of Assembly 1855-6,) a partial payment, or verbal acknowledgment of a debt, is not sufficient to protect it from the effect of the statute of limitations. *Holland vs. Chaffin et al.* - - - - - 343

MALICIOUS PROSECUTION.

- 1. In a suit for malicious prosecution, proof that the grand jury returned "no bill" on the indictment, is sufficient proof *prima facie*, of the termination of the prosecution. *Woodruff vs. Woodruff*, - - - 237
- 2. And in such action the plaintiff may examine the Solicitor General as to whether the prosecution was renewed or not. *Ibid.*

MANUMISSION OF SLAVES BY WILL.

- 1. A testator said by his will, in effect, that after the payment of his debts, his desire was, that his negroes should be hired out until their hire, together with any surplus of the fund ordered to be applied to the payment of debts, should amount to \$1800. That when this sum was thus raised, and was in the hands of his executor, he willed to his executor certain negro slaves, in trust to be conveyed by him to some one of the free States and there left; but if the executor was prevented from executing this provision, then he bequeathed the negroes to the executor in trust, to be delivered by him to the Colonization Society. And he said further, he gave to the executor \$200 for his trouble in carrying out the above provisions; and that the surplus, if any of the \$1800, was to be divided among the negroes, after their removal.
Held, that all of these provisions were void. *Pinckard vs. McCoy et al.* - - - 28

MARRIAGE SETTLEMENTS.

- 1. Valid as between the parties, although not recorded. *Reinhart vs. Miller.* - - - 402
- 2. A marriage being in contemplation between David B. M. S., and Mary J. M., it was "covenanted and

agreed" by him, on the one part, and her and certain persons as her trustees, on the other,—That the right to the property then held by her, or that might afterwards come to her, should "forever remain in her," by whatsoever name she might assume, "and to the issue of her body forever;" that no part of the property should ever be subject to any debt of his; that he, with her, should enjoy the profits of the property during her life; "she reserving to herself the right in all cases, with the consent of the trustees, to sell, bargain, grant, or convey, either by deed, will, or otherwise," any part of the property; and that if she should "die intestate, and without issue," the property was to be divided into halves, one of which was to go to him, the other in equal parts to her mother and the children of her sister, Elizabeth G. M.

The marriage took place; she had three children; she died intestate.

Held, That these children took the property in preference to David B. M. S. *Sheppard vs. Sheppard et al.* - 426

MORTGAGES.

1. Mortgagees may waive the lien of their mortgages, and claim the money, with the consent of the mortgagor, without foreclosure. *Byars vs. Rancroft, Betts and Marshall*, - - - - - 34
2. Mortgagees cannot claim against the rights of other judgment creditors, even with the consent of the defendant, money arising from the sale of property not mortgaged. *Ibid.*
3. Land was bound by mortgage and by judgments younger than the mortgage. The land was of less value than the amount of the mortgage, which was not foreclosed: The land was levied on by *fi. fa.* issued on

one of the judgments, and on the day of sale, the mortgagor and mortgagee agreed that it should be sold free from the mortgage lien, which should be transferred to the proceeds of the sale. Notice was given at the sale of this agreement. The land was sold and brought its full value. *Held*, That this agreement was valid. *Baker & Wilcox vs. Wimpee*, - - - 69

4. To deprive the mortgagee of the lien thus acquired, the other creditors must show clearly a superior equity. *Ibid.*

NEW TRIAL.

1. A new trial will not be granted upon the ground of newly discovered evidence, unless it is probable that if introduced it might change the verdict. *Teal vs. The State*, - - - - - 75

2. If the verdict be contrary to law and evidence, a new trial will be granted. *Holland vs. Chambers*, - - - 193

3. When the verdict of the jury is contrary to law, or strongly and decidedly against the evidence, a new trial will be granted. *Mitchell vs. The State*, - - - 211

4. A charge that cannot possibly operate "against" a party, cannot be made the ground for a new trial, even under the New Trial Act of 1854. *Woodruff vs. Woodruff*, - - - - - 237

5. Evidence was rejected that was admissible, but if admitted, it ought not to have changed the verdict. No motion was made for a new trial.

Held, That the rejection of the evidence was not a sufficient cause for a new trial. *Fits et al. vs. The Governor, &c.* - - - - - 307

6. When the verdict of the jury is contrary to law, or strongly and decidedly against the evidence, a new trial will be granted. *Ibid.*
7. If improper evidence is admitted to the jury without objection, it is too late after trial, to take advantage of it. *Arline ex'or vs. Miller,* - - - - 330
8. New trial refused on the ground taken in the rule, that the verdict was against law, evidence and the preponderance of evidence, but awarded on other grounds. *Beale vs. Hall,* - - - - 431
9. When four years have elapsed and no action been had upon a motion for a new trial, the jury have a right to infer that it has been abandoned, or that it is kept pending collusively, where the liability over of the successful party in the suit, is dependent upon the termination of the litigation. *Keaton vs. Musgrove, adm'r.* - 566
10. A new trial granted on the ground that the verdict of the jury is contrary to evidence. *Jones vs. Keaton,* - 582

See *Criminal Law* 9, 17.

NOTICE.

1. A notice given at a Sheriff sale, that a mortgage, held by a third person who is not present, and when the proceedings are without his consent, will be paid from the proceeds of sale, or by the persons giving the notice, will not bind the mortgagee; but the mortgagor giving his consent will be bound. *Byars vs. Bancroft, Betts and Marshall,* - - - - 34
2. Persons holding junior judgments will not be bound by such notice. *Ibid.*

See *Contracts* 2. *Criminal Law* 27.

NOTICE TO SUE.

1. A notice by an endorser to sue, given to an agent who has no authority but to collect, and which is known to the endorser, is not such a notice to the "holder," under the statute, as will discharge the endorser. *Carhart, Brother & Co. vs. Wynn.* - - - 24

NUNCUPATIVE WILLS.

1. No nuncupative will can be good, "unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect." *Sampson, caveator vs. Browning,* - - - 293
2. A person, certain of whose words were propounded as his nuncupative will, was, at the time of speaking the words, laboring under a wound of which he died in twelve hours, and was in a constant state of stupor, except when aroused from it by the interference of other persons present: *Held,* That the words were to be considered as words spoken, "in the time of his last sickness." *Ibid.*
3. A written will that is *signed* by the maker of it, cannot be set up as a *nuncupative* will. *Stamper vs. Hooks,* 603

ORDINARY—COURT OF

1. Letters of administration certified thus: "Given under my hand and seal in office, this August 7th, 1854.
JOSEPH GAR, Ordinary, D. C."
[Decatur County.]

Held, That under the Act of 1852, organizing the Court of Ordinary anew, that this was a sufficient certificate.

Witzel vs. Pierce adm'r, - - - - - 113

2. On an appeal from the Ordinary on a guardian's return, the account offered by the guardian, must be submitted to the jury as the matter he proposes to prove, but the vouchers do not go as a matter of course.

Hendry vs. Hurst and wife. - - - - - 319

3. Vouchers embracing charges for several years board, clothing, tuition, &c. specifying the time and amount claimed, are not too general to be admitted in evidence to the jury; but when accounts are thus presented they ought to be strictly proved. *Ibid*.

4. The Courts of Ordinary of Georgia have no jurisdiction to grant letters of administration on the estate of a citizen of Alabama, who died there, leaving no property of any description in Georgia. *Putillo vs. Barsdale*, 350

See *Administrators*, &c.

PAROL CONTRACTS.

1. When a party contracts, on the purchase of a negro taken in payment of a debt, to reconvey on the repayment of the amount at which the negro was estimated, and agrees to reduce the agreement to writing, but afterwards refuses, it is not a *parol* contract within the statute of frauds, nor is it a case in which *parol* evidence cannot be admitted under the Act of 1837. *Cobb 274. Henderson vs. Touchstone*, - - - - - 3

See Equity, Pleading and Practice 4.

PAROL EVIDENCE.

1. It may be shown by parol evidence that the endorsement of a note was made for a special purpose, for instance as an authority to collect. *Carhart, Brothers & Co. vs. Wynm.* - - - - - 24

See Parol Contracts.

PARTIES.

When the right survives to the wife, the representatives of her deceased husband need not be made parties to her suit to recover her choses in action, and when all the heirs of the estate in which she sues for her interest, are made known in the proceedings, they need not be made parties. *Arline ex'or vs. Miller,* - - - - - 230

PLEADING.

1. If the cause of action comes under the Short Forms Act, it is sufficient to set it out in the language of the statute; and all things else necessary to a recovery, may be supplied by proof. *Strawn vs. Kersey et al.* - - - - - 306

2. If the cause of action is defectively set out under the Act of 1847, the declaration may be amended. *Ibid.*

See Contracts 4.

POSSESSORY WARRANTS.

1. Under proceedings to obtain a restoration of person-

al property to the possession of a party from whom it has been taken without his or her consent, neither the right to the possession, nor the title to the property can be investigated. *Mills adm'r vs. Glover*, - - - 310

2. After the expiration of four years from the taking, a possessory warrant will not lie, the party having had the possession in the mean time without disturbance. *Ibid.*

PRACTICE (*In Superior Court.*)

1. To make an objection to evidence available as error, it must be made during the trial. It cannot be good after verdict, on a motion for a new trial. *Carhart, Brothers & Co. vs. Wynn*, - - - 24

2. When a motion to continue is refused, and witness, on account of whose absence the motion was made, is brought into Court and testifies, it is no ground for a new trial—admitting that the Court erred in refusing the motion. *Mitchell vs. The State*, - - - 211

3. All grounds of a motion to continue must be urged at once: and after a decision upon one or more grounds, another can be afterwards taken or urged. *Ibid.*

4. A party may voluntarily release a part of a finding in his favor, when it does not prejudice his adversary. *Hendry vs. Hurst and wife*, - - - 319

5. If improper evidence is admitted to the jury without objection, it is too late after trial to take advantage of it. *Artine ex'or vs. Miller*, - - - 330

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6. Reference to the evidence given in the case made by the presiding Judge, in deciding a point raised by counsel in the progress of a cause, is not error. *Reinhart vs. Miller.* - - - - - 409

7. No error for the Judge of the Superior Court to refuse to allow counsel to withdraw their announcement that they had closed their case, for the purpose of enabling him to examine further a witness, who had been on the stand, in relation to a matter not material to the justice of the case. *Beale vs. Hall,* - - - - - 431

8. The Court may direct the correction of the verdict of the jury in matters of form. *Ibid.*

9. No error for the Court to refuse to allow the jury to be polled. *Ibid.*

10. If an answer of a witness to interrogatories, understood in one way, will make his answer admissible, understood in another way, will make them inadmissible; and it is doubtful from the answer in which of the two ways it ought to be understood, the question on the answer is one of fact, and therefore, the answer and the other answers should be sent to the jury to be regarded, or disregarded by them, according to the one of the two ways in which they determine the question. *Thompson vs. Wright.* - - - - - 407

11. The counsel on the plaintiff's side opens his case to the jury, but does not read any law; the counsel for the defendant replies, and during his reply, is handed a decision, as law for the plaintiff, by the counsel for the plaintiff, and he comments on the decision. *Held,* That the counsel for plaintiff, in the conclusion,

has also the right to comment on the decision. *Linsey vs. Ramsey*, - - - - - 627

PRACTICE SUPREME COURT.

1. The bill of exceptions must show that the decisions complained of, were actually made, and the only proof of the fact is the certificate of the presiding Judge. *Cameron et al. vs. Ward*, - - - - - 168
2. The presumption is that the judgments of the Superior Courts are right and the *onus* is upon the plaintiff in error, to make it appear otherwise. *Ibid.*
3. When the fact appears only in the rule *nisi*, for a new trial, that the Court refused to charge as requested, and the rule is disallowed by the Court, without stating the grounds, it is no evidence of the fact recited in the rule *nisi*, especially when the Judge certifies that he gave the charge stated in the rule, but is silent as to his refusal to charge. *Ibid.*
4. When the decision of the Court in refusing a continuance is excepted to, the grounds of the motion must be stated. *Reinhart vs. Miller*. - - - - - 402
5. This Court will not pass its judgment on an exception that the presiding Judge in the Court below does not admit to be correctly stated. *Thomasson vs. The State*. - - - - - 499
6. If an exception be not taken at the trial, it cannot be heard in this Court. *Brown et al. vs. Burke*, - - - - - 574

PRESENTMENT BY GRAND JURY.

1. The presentment by a grand jury, is an accusat'on—

a prosecution—which arrests the statute of limitations.

Brock vs. The State. - - - - - 95

PUBLIC OFFICER.

See *Damages* 4.

QUI TAM ACTIONS.

A *qui tam* action does not lie in this State, to recover the penalty under 32d Henry 8th for the sale of pretended titles to land. *Milsaps vs. Johnson,* - - - - 105

QUO WARRANTO.

1. A *quo warranto* does not afford an adequate remedy to *cestui que trusts*, who charge trustees of an incorporated academy with breaches of trust; nor is it adequate for their successors who make the same charges, though the former claim the office on the ground that they have not been legally superseded. *Dart et al. vs. Houston, et al.* - - - - 506

RECEIVER.

If a person has a legal title to a fund, for his indemnity, it ought not, whilst that title subsists, to be ordered out of his hands into the hands of a receiver; especially if the fund is in no danger. *Brady vs. Furlow & Co. et al.* 613

RECOGNIZANCE.

See *Criminal Law*, 18, 19, 20, 22.

REGISTRY OF DEEDS.

See *Deeds* I. *Marriage Settlements* 1.

ROADS—PUBLIC

1. An order of the Inferior Court to certain persons, as commissioners to examine the change of location of a public road, with instructions, that if they found the proposed *alteration* of public utility, to mark out the same and report to the Court; they do mark out and report to the Court, and the Court order that the party applying, be allowed to open the road at his own expense, this is an order to change the road. *Nichols vs. Sutton et al.* - - - - - 369
2. The Inferior Courts have authority to make or alter or establish public roads, and beyond this, their jurisdiction is to enforce the road laws and to compel officers in subordinate authority to discharge their duties. *Ibid.*

SAVANNAH—CITY COURT OF.

The Act of 1820, "to regulate the mode of prosecuting actions against contractors and copartners, in certain cases," applies to the City Court of Savannah. *Bank of Savannah vs. The Planters Bank et al.* - - - 466

SECURITY FOR COSTS.

- In an appeal from the Court of Ordinary, the appellant deposited with the Ordinary sufficient money to pay any future costs that might accrue in the case. *Held*, That if this appeal was not sufficient as it stood, it was amendable. *Hill vs. Hudspeth,* - - - 621

SETTLEMENT—BY NOTE.

1. Where a note is given by an executor to a legatee up-

on settlement, for his interest in the estate, in the hands of the executor, and it turns out that the note was for too large an amount, the maker is entitled to have it scaled down to the true amount, and this without any stipulation to that effect, at the time the note was given.

Barnes vs. Stephenson, - - - - 209

SHERIFF.

1. If the Sheriff pay over money in his hands, raised on a *fi. fa.* against defendant, upon the order of defendant, to some debt not entitled to it, he will be protected.

Pitts et al. vs. The Governor, &c. - - - - 307

2. A Sheriff after having retired from office may be ruled. *Hand, Williams & Co. vs. Sample,* - - - 476

3. But he cannot move to re-instate a case to which he is no party, which has been dismissed by the Court. *Ibid.*

SURETY—DISCHARGE OF

1. The dismissal of a levy on real estate belonging to principal, by the plaintiff in *fi. fu.*, does not discharge the surety. *Wyley vs. Stanford,* - - - - 385

TENANTS IN COMMON.

1. If one tenant in common, receive more than his just share, he is liable to account to his co-tenant for such surplus, and for all the profits which he makes out of such surplus; and if there is proof that he used such surplus, and no proof as to whether he made any profits out of it or not, the presumption is, that he made

profits out of it, and profits at least equal to the interest on the value of such surplus calculated at the legal rate. *Huff and Chambers vs. McDonald*, - - 131

2. If one tenant in common, receive more than his just share, the statute of limitations does not commence running in his favor, so as to bar an action of account by the co-tenant, until the tenant begins to hold such surplus adversely to the co-tenant, and knowledge of that fact comes to the co-tenant. *Ibid.*

TIME.—ESSENCE OF CONTRACT.

1. When C. & J. advance money to C. to pay for land bought of him by W. and take the title to themselves, to secure the re-payment of the sum thus advanced, and a time is stipulated for the re-payment, with the stipulation that, on default of W., the land may be sold to reimburse the lenders, it is sufficient if W. tender the money at any time before the land is sold and paid for, especially if the purchaser know of the pre-existing equities between the parties. *Cameron et al. vs. Ward*, 163

TROVER.

1. In trover for negroes, the verdict was for the plaintiff for \$2,700, "which," could "be satisfied by delivering to the plaintiff, the said slaves, within ten days." Within the ten days, one of the slaves died and another was attacked with a disease of which it shortly afterwards died.

Held, that the defendant was, nevertheless, bound to pay the \$2,700. *Willis vs. Willis adm'r.* - - 190

2. Disposition of trust property by will, by a testator who was trustee, is a conversion of the property, but it may be followed by *cestui que trust* into the hands of the executor. *Arline exo'r vs. Miller*, - - - 330

USURY.

1. If a note, charged with being usurious, have its origin or grow out of a transaction with a partnership which was dissolved before the note was given, it is legal and competent to inquire into that transaction, so far as it may be necessary to elucidate the matter in issue to the jury. *Holland vs. Chambers, et al.* 193
2. If an usurious debt due by a firm, be divided on its dissolution, and each partner assume a part, the division of the debt does not purge it of the usury, and the original contract between the firm and the plaintiff may be inquired into by one of the partners to sustain a plea of usury. *Ibid.*
3. If the entire consideration of the note was the usury agreed to be paid, no part of it is recoverable. *Ibid.*
4. The principal of a joint and several promissory note, against whom a process was sued out, but no service made, and who was no party to the issue, is a competent witness for his sureties, to sustain a plea of usury, if he be released by them from the costs. *Ibid.*
5. Defendants must sustain their plea of usury by proof of such facts as will enable the jury to come to a decision as to the usury paid. *Ibid.*

VERDICT.

See, Practice Superior Court, 4, 8.

VIOLATION OF ORDINANCE.

1. The breach of a pound and liberating a cow confined therein, is no violation of an ordinance against opposing and interrupting the Marshal in executing an ordinance which required him to take up and impound cattle strolling at large in the city. *The Mayor and Council of Rome vs. Omsburg.* - - - -

WARRANTY.

1. In ejectment, if the lessor of the plaintiff has made a warranty of the land to the tenant, or to those under whom the tenant claims, the tenant may use the warranty, not to estop such lessor, but, to "rebut and barre him" of the action. *Linsey vs. Ramsey.* - 62

WIFE'S EQUITY.

See, Husband and Wife, 2.

WILLS.

See, Deeds, 6, 7, 8. Legacy. Manumission of Slaves.

WITNESSES.

1. The Court may order to be entered on the minutes of the Court the consent of a party to the suit, that the opposite party and his security on the appeal, be examined fully as witnesses, and such consent not only makes them competent, but precludes objection to their

credit on account of their relation to the case as parties. *Varner vs. Goldsby.* - - - 308

2. Although a witness may be impeached, and may not afterwards be corroborated, yet, it must be a question for the jury, whether he is not still to be believed, notwithstanding the impeachment. *McPherson vs. The State.* - - - - - 478

See, *Evidence*, 2. 11, 13. *Usury* 4.



